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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 76

KLOR'S INC., PETITIONER,

vs.

BROADWAY-HALE STORES, INC., ADMIRAL CORPORATION, ADMIRAL DISTRIBUTORS, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 31, 1958
CERTIORARI GRANTED OCTOBER 13, 1958

No. 15380

United States
Court of Appeals
for the Ninth Circuit

KLOR'S, INC., Appellant,

vs.

BROADWAY-HALE STORES, INC., et al., Appellees.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division

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For Appellee Leo J. Meyberg Co.

In the District Court of the United States, Northern District of California, Southern Division

No. 35274

KLOR'S INC., Plaintiff,

vs.

BROADWAY-HALE STORES, INC., a Delaware Corporation, et al., Defendants.

COMPLAINT

For Damages and Injunctive Relief under the Sherman, Clayton and Robinson-Patman Anti-Trust Laws of the United States.

Jury Trial Demanded

The above-named plaintiff complains of the above-named defendants and each of them as follows:

Count One

I.

Jurisdiction and Venue

1. This complaint is filed and these proceedings are instituted against the above-named defendants under Sections 15 and 26 of Title 15, U.S.C.A., being part of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce against Unlawful Restraint and Monopolies", as amended, commonly known as the Sherman Act and the Clayton Act. The purpose of this action

is to recover damages against the above-named defendants for injuring plaintiff in its business of selling at retail radios, television sets, clothes washers and dryers, refrigerators, electric and gas ranges, phonographs and electric appliances (sometimes herein referred to as the products) at its store at 2581 Mission Street, San Francisco, California, which injury proximately resulted from defendants' violation of the anti-trust laws of the United States, and to restrain and enjoin the defendants from continuing the illegal monopoly and the combination, conspiracies and contracts in restraint of plaintiff's trade and commerce.

2. The business of manufacturing, distributing and selling radios, television sets, clothes washers and dryers, refrigerators, electric and gas ranges, phonographs and electrical appliances and the activities of each branch of said industry are within or directly affect trade and commerce among the several states. In the course of manufacturing, distributing and selling said products, there is a continuous stream of trade and commerce between the states and between the territories of the United States, consisting of the assemblage of personnel, property and materials at the factories for the production of said products, the transportation of said products to factory branches, distributors and other selling organizations throughout the United States, the transportation of said products from factory branches and distributors to retailers, the interchange and transfer of said products between factory branches and distributors and other factory

branches and distributors located in other states and territories of the United States, are all within and directly affect interstate commerce.

3. Each of the defendants transacts business and maintains offices in the above-described district and division.

II.

Description of the Parties

4. The plaintiff, Klor's, Inc., is a California corporation whose place of business is at 2581 Mission Street, San Francisco, California. Plaintiff operates and since 1952 has operated a store at that address and engages in the business of selling radios, television sets, clothes washers and dryers, refrigerators, electric and gas ranges, phonographs and electrical appliances at retail. For some years prior to 1952, at which time plaintiff was incorporated, said business was operated by its now president and principal officer, George Klor, as an individual. From the standpoint of equipment, location and management, plaintiff's business has at all times been capable of selling at retail a large volume of all lines of the products.

5. The defendant, Broadway-Hale Stores, Inc., hereinafter referred to as Hale, is a Delaware corporation, operating, among other things, a chain of stores in the western area of the United States selling at retail radios, television sets, clothes washers and dryers, refrigerators, electric and gas ranges, phonographs and electrical appliances; one of said stores is located at 2565 Mission Street, San Francisco, California, and is in competition with

plaintiff. Admiral Corporation, hereinafter referred to as Admiral, is a Delaware corporation, engaged in the manufacture, distribution and sale of Admiral radios, television sets, refrigerators, electric ranges and phonographs. Admiral Distributors, Inc., hereinafter referred to as Admiral Distributors, is a Washington corporation, a wholly owned subsidiary of Admiral, and is engaged in the distribution and sale of Admiral radios, television sets, refrigerators, electric ranges and phonographs. Zenith Radio Corporation, hereinafter referred to as Zenith, is an Illinois corporation, engaged in the manufacture, distribution and sale of Zenith radios and television sets. Zenith Radio and Distributing Corporation, hereinafter referred to as Zenith Distributing, is an Illinois corporation, a wholly owned subsidiary of Zenith, and is engaged in the distribution and sale of Zenith radios and television sets. Whirlpool Corporation, hereinafter referred to as Whirlpool, is a New York corporation, engaged in the manufacture, distribution and sale of Whirlpool clothes washers and dryers. H. R. Basford Company, hereinafter referred to as Basford, is a Nevada corporation, an affiliate and agent of Zenith and Whirlpool, and is engaged in the distribution and sale of Zenith radios and television sets and Whirlpool clothes washers and dryers. Radio Corporation of America, hereinafter referred to as RCA, is a Delaware corporation, engaged in the manufacture, distribution and sale of RCA radios and television sets. Leo J. Meyberg Company, hereinafter referred to as Meyberg, is a

California corporation, an affiliate and agent of RCA, and is engaged in the distribution and sale of RCA radios and television sets. Emerson Radio and Phonograph Corporation, hereinafter referred to as Emerson, is a New York corporation, engaged in the manufacture, sale and distribution of Emerson radios and television sets. Jefferson-Travis, Inc., hereinafter referred to as Jefferson-Travis, is a New York corporation, a wholly owned subsidiary of Emerson, and is engaged in the distribution and sale of Emerson radios and television sets. Philco Corporation, hereinafter referred to as Philco, is a Pennsylvania corporation, engaged in the manufacture, distribution and sale of Philco radios, television sets and refrigerators. Philco Distributors, Inc., hereinafter referred to as Philco Distributors, is a Delaware corporation, a wholly owned subsidiary of Philco, and is engaged in the distribution and sale of Philco radios, television sets and refrigerators. Dallman Supply Company, hereinafter referred to as Dallman, is a California corporation, an affiliate and agent of Philco and Philco Distributors, and is engaged in the distribution and sale of Philco radios, television sets and refrigerators. Rheem Manufacturing Company, hereinafter referred to as Rheem, is a California corporation, engaged in the manufacture, distribution and sale of Wedgewood gas stoves. General Electric Company, hereinafter referred to as GE, is a New York corporation, engaged in the manufacture, distribution and sale of General Electric radios, television sets, refrigerators, electric ranges,

clothes washers and dryers and electrical appliances. General Electric Distributing Corporation, hereinafter referred to as GED, is a New York corporation, a wholly owned subsidiary of GE, and is engaged in the distribution and sale of General Electric radios, television sets, refrigerators, electric ranges, clothes washers and dryers and electrical appliances. Olympic Radio and Television, Inc., hereinafter referred to as Olympic, is a New York corporation, engaged in the manufacture, distribution and sale of Olympic radios and television sets. Olympic Television of Northern California, hereinafter referred to as Olympic Television, is a California corporation, a wholly owned subsidiary of Olympic, and is engaged in the distribution and sale of Olympic radios and television sets. Tappan Stove Company, hereinafter referred to as Tappan, is an Ohio corporation, engaged in the manufacture, distribution and sale of gas stoves. O'Keefe and Merritt Company, hereinafter referred to as O'Keefe and Merritt, is a California corporation, is an affiliate and agent of Tappan, and is engaged in the distribution and sale of gas stoves. The defendants, other than the defendant Hale, are sometimes hereinafter referred to as the manufacturer-distributor defendants.

III.

The Conspiracy

6. As hereinbefore stated, for some years prior to the incorporation of plaintiff, plaintiff's president and principal officer, George Klor, was en-

gaged in the business of selling radios, television sets, clothes washers and dryers, refrigerators, electric and gas ranges, phonographs and electrical appliances at retail, as an individual, in the San Francisco Bay area. Plaintiff, and plaintiff's president and principal officer, George Klor, have built up a reputation for honesty, fair dealing, integrity and "know how" within the trade in this area and was enjoying the accompanying prosperity, and with access to credit and enjoying a good reputation, plaintiff was in a position to prosper in ordinary competition.

Beginning at a period prior to 1952, and continuing uninterrupted up to and including the date of the filing of this complaint, the defendants, all well knowing the facts herein alleged, have restrained trade and commerce in the interstate distribution and sale of radios, television sets, clothes washers and dryers, refrigerators, electric and gas ranges, phonographs and electric appliances in the San Francisco Bay Area by contracting, combining, conspiring together, and each with the other, in restraint and monopoly of such trade and commerce contrary to Sections 1 and 2 of the Act of Congress, commonly known as the Sherman Act, 15 U.S.C.A., Sections 1 and 2, and have thereby substantially lessened, limited and restrained competition in said trade and commerce, and have prevented plaintiff from obtaining radios, television sets, clothes washers and dryers, refrigerators, electric and gas ranges, phonographs and electrical appliances for resale; and have discriminated

against plaintiff and in favor of plaintiff's competition in the sale and distribution of the products; and have refused to sell to or to enter into any contract to sell the products to plaintiff. Such combination, conspiracy and agreement tend to and do actually restrain and monopolize interstate commerce in the distribution and sale of radios, television sets, clothes washers and dryers, refrigerators, electric and gas ranges, phonographs and electrical appliances in favor of Hale. More particularly, the manufacturer-distributor defendants in pursuing a policy in favor of Hale and against plaintiff, have done and are continuing to do the following acts:

a. They have furnished paid salesmen and demonstrators to Hale in connection with the sale or offering for sale of their products bought for resale, such salesmen and demonstrators not being accorded to plaintiff, a competitor of Hale, on proportionately equal terms;

b. They have sold their products to Hale at a price substantially lower than the price paid by plaintiff;

c. They have contracted to pay, paid and granted to Hale substantial advertising and other allowances in connection with the sale of their products, such advertising and other allowances not being accorded to plaintiff on proportionately equal terms;

d. They have refused to accept the business of and to sell their products to plaintiff, while freely selling their products to Hale;

e. They have discriminated against plaintiff in favor of Hale;

f. They have favored Hale and discriminated against plaintiff with respect to availability, price, terms and conditions in connection with the sale and distribution of their products;

g. They have permitted Hale to enjoy a monopolistic position in the sale and distribution of the products;

h. They have permitted Hale to use a monopolistic buying power so as to secure discriminatory terms over plaintiff;

i. They have refused to enter into any contract with plaintiff so as to make their products available to plaintiff.

7. Plaintiff alleges representatives of the manufacturer-distributor defendants have inspected and are familiar with plaintiff's place of business and know that it is at least comparable to the stores operated by Hale in plaintiff's competitive area.

8. The defendant Hale operates a chain of key stores in the west coast area of the United States. It enjoys a monopolistic buying power by reason of the large number of retail outlets it operates. It has used its monopolistic buying power to negotiate terms and conditions of acquisition and purchase of the products manufactured, distributed and sold by the manufacturer-distributor defendants. It has also used its monopolistic buying power to deny to plaintiff its competitive position in the acquisition, purchase and sale of the products man-

ufactured, distributed and sold by the manufacturer-distributor defendants and, in particular, has purchased and continues to purchase the products of the manufacturer-distributor defendants upon the condition that the manufacturer-distributor defendants do not sell their products to the plaintiff. The manufacturer-distributor defendants have dealt with Hale throughout the period of time alleged on a chain basis and have manufactured, distributed and sold the products for resale in the San Francisco Bay Area in consideration of manufacturing, distributing and selling the products to Hale for resale in other parts of the West Coast area of the United States.

9. By reason of the monopoly of buying power of defendant Hale, and the illegal and discriminatory tactics, combinations, conspiracies and agreements in restraint of trade by the manufacturer-distributor defendants acting in collaboration, the business of plaintiff has been seriously impaired, injured and damaged, and the plaintiff has suffered great damage in loss of profits, good will, reputation and prestige of its store as a retail dealer in radios, television sets, clothes washers and dryers, refrigerators, electric and gas ranges, phonographs and electrical appliances. Plaintiff has been paying unreasonable and discriminatory prices and has been subjected to unfair, unreasonable and discriminatory practices to the damage and loss of plaintiff and to the advantage of defendants, all by reason of the defendants' violation of the anti-trust laws.

10. Plaintiff's damage within the three years preceding the filing of this complaint as a result of the violations of the anti-trust laws is One Hundred Fifty Thousand Dollars ($150,000.00).

Wherefore plaintiff prays:

1. That summons issue to each of the defendants commanding it to appear herein and to answer the allegations contained in this complaint, and to abide by and perform such orders and decrees as the Court may make in the premises;

2. That the plaintiff receive with interest as damages for the injury to its business the sum of Two Hundred Fifty Thousand Dollars ($250,000.00), that the sum be trebled, and that the Court award a reasonable attorneys' fee in accordance with Section 4 of the Clayton Act, 15 U.S.C.A., Section 15, in such cases made and provided;

3. That the defendants, and each of them, be permanently enjoined and restrained from each and every one of the unlawful practices alleged in the plaintiff's complaint;

4. That the aforesaid combination and conspiracy, contracts, agreements, arrangements and understandings in restraint of interstate trade and commerce, conspiracy to monopolize, attempts to monopolize and monopolization of interstate trade and commerce be adjudged and decreed to be unlawful, and that the contracts, agreements, arrangements and understandings and practices alleged in this complaint be adjudged and decreed to be in violation of Sections 1 and 2 of the Sherman Act.

5. That the Court adjudge and decree that the defendants have combined and conspired to restrain unreasonably and have conspired to monopolize and have monopolized interstate trade and commerce in the manufacturing, distributing and selling of the products in violation of Sections 1 and 2 of the Sherman Act.

6. That the defendants and any of their subsidiaries or affiliated companies, their officers, directors, agents and employees and their respective successors, assignees or transferees be enjoined from agreeing, combining, conspiring or contracting with each other or with any other person or corporation whatsoever to restrain, control or eliminate competition among themselves or others, from restraining in any way and from agreeing on the prices, terms or conditions in the manufacturing, distributing and selling of the products in the State of California or from conspiring or attempting to monopolize, or monopolizing the interstate trade and commerce herein alleged;

7. That the Court issue a preliminary injunction prohibiting the defendants, and each of them, and their officials, directors, agents and employees from continuing to discriminate against plaintiff by agreement or concert of action;

8. That plaintiff recover its costs herein; and

9. That the plaintiff have such other and further relief as the Court may deem proper.

* * * * *

Wherefore, plaintiff demands judgment against defendant, in the sum of One Hundred Fifty Thousand Dollars ($150,000.00), plus a reasonable attorneys' fee, and the costs of this action.

/s/ IRVIN GOLDSTEIN,
Attorney for Plaintiff

Plaintiff demands a Jury Trial.

[Endorsed]: Filed February 23, 1956.

[Title of District Court and Cause.]

AMENDMENT TO COMPLAINT

Plaintiff, Klor's, Inc., amends its complaint filed herein in the following manner: Count One, page 10, lines 18 and 19, strike out the words and numerals "One Hundred Fifty Thousand Dollars ($150,000.00)" and substitute in lieu thereof the words and numerals "Two Hundred Fifty Thousand Dollars ($250,000.00)".

/s/ IRVIN GOLDSTEIN,
Attorney for Plaintiff

Certificate of Service by Mail attached.

[Endorsed]: Filed April 13, 1956.

[Title of District Court and Cause.]

NOTICE OF MOTIONS

To: Plaintiff Klor's, Inc., and to its attorney Irvin Goldstein, Esquire:

Please Take Notice that on May 21, 1956 at 9:30 a.m. or as soon thereafter as counsel can be heard, defendant Broadway-Hale Stores, Inc. will move, on the Master Calendar of the above-entitled Court, Seventh and Mission Streets, San Francisco, California, as follows:

1. To dismiss Count One of the complaint as against defendant Broadway-Hale Stores, Inc., for failure to state a claim for relief against said defendant.

* * * * *

[Endorsed]: Filed May 3, 1956.

[Title of District Court and Cause.]

MEMORANDUM OF DEFENDANT BROADWAY-HALE STORES, INC., IN SUPPORT OF MOTIONS TO DISMISS, TO SEPARATELY STATE, AND FOR MORE DEFINITE STATEMENT

* * * * *

There is still another major deficiency in Count One's attempted statement of a claim under the Sherman Act. The cases are legion that no cause of action under the Sherman Act exists unless

there is an injury to the public interest, and that the Act does not care whether the plaintiff or someone else does the business so long as interstate commerce continues. That is to say, there must not only be injury to the plaintiff, but to the public also.

* * * * *

[Endorsed]: Filed May 3, 1956.

[Title of District Court and Cause.]

STIPULATION FOR AMENDMENT OF COMPLAINT AND EXTENDING THE TIME OF WHIRLPOOL-SEEGER CORPORATION TO PLEAD

Whereas, since the filing of its complaint herein plaintiff has become apprised of facts indicating the necessity of amending its complaint herein to substitute Whirlpool-Seeger Corporation as a defendant herein in the place and stead of the defendant named as Whirlpool Corporation, and likewise to include in said complaint as so amended appropriate charging allegations against said Whirlpool-Seeger Corporation; and

Whereas, a number of the defendants above named heretofore have made and filed motions attacking the sufficiency of the complaint herein upon various grounds, all of which motions are still pending and undetermined; and

Whereas, it is deemed advisable to delay the above amendment to the complaint until said pending motions have been determined;

Now, Therefore, it is hereby stipulated by and between the plaintiff above named and said Whirlpool-Seeger Corporation, through their respective counsel, as follows:

1. That plaintiff may amend its complaint herein in the manner above mentioned at any time within fifteen days from the time that the aforesaid motions of the other defendants which are presently pending are determined.

2. That upon such amendment being made and service thereof upon the undersigned attorneys for said Whirlpool-Seeger Corporation, said corporation shall have twenty days from the time of such service within which to plead or otherwise move to the complaint herein as so amended.

Extension of thirty-nine days to plead heretofore granted by stipulation of counsel.

Dated this 9th day of May, 1956.

/s/ IRVIN GOLDSTEIN,
Attorney for Plaintiff

BACIGALUPI, ELKUS &
SALINGER,
/s/ CLAUDE N. ROSENBERG,
Attorneys for Whirlpool-Seeger
Corporation

It Is So Ordered this 14th day of May, 1956.

/s/ EDWARD P. MURPHY,
Judge of the Above Court

[Endorsed]: Filed May 14, 1956.

[Title of District Court and Cause.]

MEMORANDUM ORDER

The complaint in this action names twenty-one defendants and contains forty-one counts. Count I alleges that all of the defendants conspired in violation of the Sherman Act, 15 U.S.C. §§1 and 2. Counts 2 through 31 allege that twenty of the defendants, in pairs of two, violated the Robinson-Patman Act, 15 U.S.C. §13(a), (d), and (e); each pair of two defendants is alleged to have sold products to defendant Broadway-Hale Stores, Inc., on discriminatory terms, namely, prices, advertising allowances, and paid salesmen, which were not given to plaintiff on proportionately equal terms. Each of Counts 32 through 41 alleges that defendant Broadway-Hale Stores, Inc., violated 15 U.S.C. §13(f), by receiving from each pair of two defendants lower discriminatory prices than plaintiff was required to pay.

* * * * *

Dated: May 22, 1956.

/s/ O. D. HAMLIN,
United States District Judge

[Endorsed]: Filed May 22, 1956.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

This cause came on to be heard on May 21, 1956 upon motion of certain defendants for separate statement of claims and to dismiss various counts of the complaint, and, after argument thereon, the Court hereby makes the following Pre-Trial Order, pursuant to stipulation of the parties:

1 (a). That Count One of the Complaint is and shall in all further proceedings be interpreted and construed as one seeking relief solely with respect to a conspiracy under the Sherman Act (Act of June 2, 1890, c. 647, as amended, 15 U.S.C.A. Sections 1 and 2), and not as seeking to assert any claim for relief under the Robinson-Patman Act (Act of June 19, 1936, c. 592, §1, 15 USC §13).

(b) That Count One of the Complaint is amended by striking the words "combinations, conspiracies and agreements" in paragraph 9, page 9, lines 25 and 26, and substituting in lieu thereof the words "combination, conspiracy and agreement, as hereinabove alleged".

(c) This Order is without prejudice to the rights of the defendants, or any of them, to call up for hearing their motions to dismiss Count One for failure to state a claim for relief.

* * * * *

Dated: June 11th, 1956.

/s/ LOUIS E. GOODMAN,
United States District Judge

[Endorsed]: Filed June 11, 1956.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated and agreed by and between the plaintiff, Klor's, Inc., the defendant named herein as Whirlpool Corporation, and the defendant Broadway-Hale Stores, Inc., that the complaint herein be amended in the following manner:

Page 1, line 18, strike out the words "Whirlpool Corporation, A New York Corporation" and substitute in lieu thereof the words "Whirlpool-Seeger Corporation, a Delaware Corporation";

Count One, page 4, lines 21 and 22, strike out the words "Whirlpool Corporation, hereinafter referred to as Whirlpool, is a New York corporation" and substitute in lieu thereof the words "Whirlpool-Seeger Corporation, hereinafter referred to as Whirlpool, is a Delaware corporation";

Count Eight, page 25, line 20, strike out the words "Whirlpool Corporation" and substitute in lieu thereof the words "Whirlpool-Seeger Corporation"; page 25, line 21, strike out the words "New York" and substitute in lieu thereof the word "Delaware";

Count 34, page 87, line 14, strike out the words "Whirlpool Corporation" and substitute in lieu thereof the words "Whirlpool-Seeger Corporation"; page 87, line 15, strike out the words "New

York" and substitute in lieu thereof the word "Delaware".

/s/ IRVIN GOLDSTEIN,
Attorney for Plaintiff
/s/ CLAUDE N. ROSENBERG,
Attorney for Whirlpool-Seeger Corporation
/s/ RICHARD HAAS,
Attorney for Broadway-Hale Stores, Inc.

It is so Ordered this 15th day of June, 1956.

/s/ EDWARD P. MURPHY,
Judge

[Endorsed]: Filed June 15, 1956.

[Title of District Court and Cause.]

NOTICE OF MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT

To plaintiff Klor's, Inc. and to its attorney, Irvin Goldstein, Esq.:

Please Take Notice that on Thursday, August 16, 1956, at 10:00 a.m. or as soon thereafter as counsel can be heard, in the courtroom of the Honorable Louis E. Goodman, Seventh and Mission Streets, San Francisco, California, defendants Broadway-Hale Stores, Inc., Admiral Corporation, Admiral Distributors, Inc. (a Delaware corpora-

tion), Whirlpool-Seeger Corporation, H. R. Basford Company, Radio Corporation of America, Leo J. Meyberg Company, Jefferson-Travis, Inc., Philco Corporation, The Dallman Company (sued herein as Dallman Supply Company), Rheem Manufacturing Company, General Electric Company, General Electric Distributing Corporation, Olympic Television of Northern California, Tappan Stove Company and O'Keefe and Merritt Company, and each of them, will move the Court to dismiss Count One of the Complaint for failure to state a claim upon which relief can be granted, and for summary judgment on said Count One on the ground that there is no genuine issue as to any material fact and the moving parties are entitled to a judgment as a matter of law.

These motions will be based upon all the pleadings, papers and orders on file herein, and upon the affidavits of Roy O. Hurd, William M. Casey, Willard H. Mixter, Parshall H. Henry, Seymour J. Cooper, Vernon S. Dallman, Robert A. Washburn, J. A. McGee, Dore Schwab, Jr., Helen H. Hogue and E. W. Derenia, attached hereto.

Dated: July 16, 1956.

/s/ CLAUDE N. ROSENBERG,
Attorney for Defendant Whirlpool-Seeger Corporation

/s/ PETER S. SOMMER,
Attorney for Defendant Jefferson-Travis, Inc.

/s/ GARRETT McENERNEY II,
Attorney for Defendant Philco Corporation

/s/ RICHARD HAAS,
Attorney for Defendant Broadway-Hale Stores, Inc.

/s/ GIRVAN PECK,
Attorney for defendants Admiral Corporation, Admiral Distributors, Inc. (a Delaware corporation), Tappan Stove Company and O'Keefe & Merritt Company

/s/ DAVID B. GIDEON,
Attorney for Defendant H. R. Basford Co.

/s/ DAVID LIVINGSTON,
Attorney for Defendant The Dallman Company

/s/ HERBERT E. HALL,
/s/ JOHN D. GALLAHER,
Attorneys for Defendant Rheem Manufacturing Company

/s/ H. W. GLENSOR,
Attorney for Leo J. Meyberg Company

/s/ PHILIP EHRLICH,
Attorney for Defendant Olympic Television of Northern California

/s/ JOHN A. SUTRO,
Attorney for Defendant Radio Corporation of America

/s/ EVERETT A. MATHEWS,
Attorney for General Electric Company and General Electric Distributing Corporation

Certificate of Service attached.

[Title of District Court and Cause.]

AFFIDAVIT OF ROY O. HURD IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

State of California
City and County of San Francisco—ss.

Roy O. Hurd, being first duly sworn, deposes and says:

1. I am now, and have for 27 years continuously last past been, the manager of the appliance division of defendant Broadway-Hale Stores, Inc.

2. As such, my duties include the general supervision of purchases of household appliances by said defendant. It is my duty to, and I do in fact, keep myself informed with respect to the various brands and types of household appliances which are on the market for sale to the public in San Francisco, and I have personal knowledge of all matters herein set out.

3. As of February 23, 1956, the following brands of household appliances were being offered for sale at retail in San Francisco:

Radiators-Cooling

RADIATOR REPAIRING
CLEANING RECORING
NEW & USED RADIATORS
AUTOS — TRUCKS BODIES
Prompt Efficient Service
PICK-UP & DELIVERY

Radio Broadcasting Companies & Stations

Radio Broadcasting Stations Representatives

Radio Communication Companies

Radio Dealers

Radio Broadcasting Program Producers

An extension telephone adds comfort and convenience to your home for only a few cents a day.

Answer promptly, speak clearly, hang up gently — three friendly telephone habits.

Keep the Classified Telephone Directory handy; it can save you time and effort.

RADIATORS
PROMPT SERVICE

AUTO – TRUCK – TRACTOR
MASTER LIBERTY
RADIATOR SERVICE
3141 Howard MArket 1-5627

RED PAGE POCKET RADIO
YUkon 2-5841
or Also 3-5440

3 WAY MOBILE RADIO TELEPHONE
RADIO COMMUNICATIONS

RADIO SERVICE
On All Makes
RAYTHEON
PACKARD-BELL
CROSLEY & RCA
DEALERS
WAlnut 1-6000

40 Years of Dependable Service Under Same Owner
Motorola Communication Dealer and Landscaping Dept.

The Sign of Service
BYINGTON ELECTRIC CO.
1809 FILLMORE STREET, ABOVE BUTTER STREET

Radio Dealers—(Cont'd)

CAPEHART RADIOS—

WHOLESALE DISTRIBUTORS

THOMSON-GIBBS CO THE
424 Townsend Yukon 2-4484

CAR RADIO SERVICE 300 Valencia Mkt'l 3-9763
CENTRAL MUSIC CO 2125 Chestnut Mkt'l 1-4921
CENTRAL RADIO CO
3330 Sacramento Jones 7-3605

KINSLEY RADIOS—

DISTRIBUTOR

CALIFORNIA ELECTRIC SUPPLY CO
1160 Folsom Uptown 3-3020

DEALER

SCHWABACHER-FREY CO
715 Market ... GArfield 1-4040

Dave's Radio & Television 1651 Polk GRaystone 6-1262
Stoughton's A C Sales 5211 Geary Blvd BAyview 1-0036
EL REY RADIO & APPLIANCE
711 Alvarado Portola 6a ... DIvisadero 1-4864

EMERSON RADIO

BETTER STYLE . . .
TONE . . .
PERFORMANCE . . .
VALUE . . .
Emerson Television and Radio
Sold only through Authorized Emerson Radio Dealers.

"FOR INFORMATION CALL"

DISTRIBUTORS

PACIFIC WEST COAST DIV OF
[illegible] Yukon 2-1400

DEALERS

Freedman's Radio Service Co
100 Golden Gate Av ... UNderhill 3-4473
Sutter Music Co 1971 Sutter ... FIllmore 6-2530
FAIRMAN FURNITURE CO
1241 Market ... MArket 1-4477

FRED GUD CO 2204 Chestnut ... JEfferson 7-2540
FREEMAN'S RADIO SUPPLY CO
200 Golden Gate Av ... UNderhill 3-6472
G & H Radio & Television Repair Service
3420 Balboa ... SUnset 2-2204
Geary Radio & Television Co
3429 Geary Blvd ... BAyview 1-4000

GENERAL ELECTRIC RADIO

Outstanding radios for superb listening pleasure. Clear reception, portable, "Deal Beauties" table models, AM-FM radio-phono combinations with the G-E Exclusive Tonemaster and Dual Sensitivity Styles.

"WHERE TO BUY THEM"

SALES & SERVICE DEALERS

A & B Varnes Electric Co
4134 Geary Blvd ... EXeter 2-5600
Ace Radio Co 2267 Market ... UNderhill 1-7525
AMERICAN APPLIANCE & SUPPLY CO
1651 Polk ... GRaystone 6-1262
Dave's Radio & Television
1651 Polk ... GRaystone 6-1262
FREEMAN'S RADIO SUPPLY CO
200 Golden Gate Av ... UNderhill 3-6472
General Appliance Company
369 Post ... GA mkt 1-7770
Kahn & Quality Tire & Supply ... UNderhill 1-0600
Pacific Radio & Television Co
2260 Mission ... GA mkt 1-0807
RICHARD E C CO
Rad-io-Apparatus
1716 Lombard ... FIllmore 6-1279
West Portal Radio & Record Shop
78 West Portal Av ... OVerland 1-2277

Emery Radio Service Co
2758 Judah ... SO mission 6-0970
Golden Star Co 366 Clay ... GA mkt 1-4488
Hadley L. Hamel 1307 Post ... GRaystone 6-7826

TO REPAIR LINOLEUM

If you have a break in the edge of linoleum, take a good-sized piece of cloth (to reach well beyond the break at all points), cover it with glue and put it beneath the linoleum. Weight it down with heavy objects until it has had time to dry and set.

HALLCRAFTERS

"THE RADIO MAN'S RADIO"

Highly sensitive, precision built, long range, fine tone quality and communication equipment.

"WHERE TO BUY THEM"

DISTRIBUTOR

RADIOPHONE D'ARNETT
333 Townsend ... DOnner 4-4200

DEALERS

Dave's Radio & Television
1651 Polk ... GRaystone 6-1262
FAIRMAN FURNITURE CO
2436 San Bruno Av ... JOnner 6-7484
Mark Sherry Tire Co 999 Geary ... BAyview 1-3441
West Portal Radio & Record Shop
78 West Portal Av ... OVerland 1-2277

FACTORY REPRESENTATIVES

Purdy Bros J Co 312 7th ... UNderhill 1-4321

COMMUNICATION DISTRIBUTORS

E F RADIO & SUPPLY CO
1284 Market ... UNderhill 1-4200
WEST COAST RADIO & ELECTRONICS
449 Sutter ... UNderhill 1-2262
ZACK RADIO SUPPLY CO
1424 Market ... UNderhill 1-1424

Harmony Radio & Record Shop
661 Clement ... BAyview 1-2566
Henry's Radio Shop 2936 College ... AShbury 1-8000
Jacobs Television Apartments
324 Cortland Av ... Bilger 6-2443
Kay's Radio & Appliances
1516 Fillmore ... JOnner 7-1000
PERFECT SOUND CO 1970 Union ... VOlunteer 6-2727
Lee's Television Radio & TV
836 Irving ... HEmlock 6-2221
Lincoln Way Radio 2240 Fillmore ... UNderhill 1-7454
Max's Radio & Appliance Exchange
919 Clay ... GRaystone 6-1760
MORRIS RADIO & TELEVISION
2304 Lombard ... GRaystone 6-0131
Morse's Radio Service 6199 3d ... VOlunteer 6-2242
Mark Sherry Tire Co 999 Geary ... BAyview 1-3441
RADIO SERVICE & TELEVISION SERVICE
Guaranteed Service On All Makes
Phonographs 19th & 20th Avenues
1060 Clement ... BAyview 1-0829
San Diego Radio Co 1051 Grant Av ... YUkon 2-3540
Serenity Radio & Appliance
2163 Polk ... GRaystone 6-6181
Stewart W & Co 3139 Mission ... VOlunteer 6-1470
Stewart Appliance Co 2311 Market ... UNderhill 1-4476
Western Radio Co 1475 Haight ... UNderhill 1-4751
Wade Radio 2240 Fillmore ... WEbster 1-2303

MOTOROLA RADIOS

Exclusive Motorolaware of Quality Products.

MOTOROLA

"Motorola has — PROVEN DEPENDABILITY in Radio, Television and Radio-Phonographs and Sets."

"WHERE TO BUY THEM"

DISTRIBUTORS

LANCASTER W J CO 3139 3d ... ATwater 6-6400

DEALERS

Ace Radio Co 2267 Market ... UNderhill 1-7525
All Radio ... GA mkt 6-3713
Arrow Radio & Television Shop
4327 Geary Blvd ... BAyview 1-3540
BOB'S RADIO & TELEVISION
4139 Mission ... JUniper 6-6872
Dave's Radio & Television
1651 Polk ... GRaystone 6-1262
FREEMAN'S APPLIANCE & SUPPLY CO
All Makes ... GA mkt 6-3713
Frye Radio & Television Shop
4327 Geary Blvd ... BAyview 1-3540
Gem Radio & TV 1473 Geary Blvd ... ORdway 1-0813
Golden Gate Radio & Record Shop
1951 Post ... GRaystone 6-1262
GOLDEN GUD CO 2204 Chestnut ... JEfferson 7-2540
Mark Sherry Tire Co 999 Geary ... BAyview 1-3441
Progressive Radio & TV
3473-3501 Mission ... VOlunteer 6-0913

SERVICE CENTER
2136 Fillmore ... WEbster 1-4712

(Continued from Column)

EXPLOSION IN OVEN

If you burn the inside of the oven with an exploded potato or something, soak a cloth in ammonia and let it stay on the burned places an hour or so, after which you can scrape the spots clean without harming the enamel.

MOTOROLA RADIOS—(Cont'd)

AUTO RADIO ONLY

Auto Radio Sales Service
1106 Bryant ... UNderhill 3-9140
Bridge Radio & Television The
Drive-In Service Star 7th & 8th Ave
4327 Geary Blvd ... BAyview 1-3540
CAR RADIO SERVICE
[illegible] Valencia ... BAyview 1-9763
[illegible] Polk ... GRaystone 6-6200
[illegible] Market ... UNderhill 1-4200
LEWIS AUTO SUPPLY CO
111 Van Ness Av ... HEmlock 1-7000
M & H Radio Service 1293 Bush ... ORdway 1-6000
MORRIS RADIO & TELEVISION
2304 Lombard ... GRaystone 6-0131
QUINT U S CO
3150 Mission ... VA terio 6-1409
S & H Radio Sales & Service
1979 Fulton ... GRaystone 6-0501
SERVICE RADIO WHOLESALE
1267 Post ... GRaystone 6-7826
SERVICE-ELECTRIC COMPANY
[illegible] Van Ness Av ... HEmlock 1-4132

Murphy's 1300 Polk ... ORdway 3-9707

MORSE SAN FRANCISCO

CHICAGO SWIFT RADIO PHONOGRAPHS
High Fidelity Phonographs & Radio Cabinets or Radio Kits
562 Stanyan ... HEmlock 1-0887

NATIONAL COMMUNICATION RECEIVERS—

ZACK RADIO SUPPLY CO
1424 Market ... UNderhill 1-1424

NATIONAL RADIO SERVICING—

E F RADIO & SUPPLY CO
1284 Market ... UNderhill 1-4200
Wade's Radio & Television Service
3412 Judah ... OVerland 1-4545
Pan Radio & Television Co
2260 Mission ... VA mkt 1-0831
Park-Presidio Radio Transmitters
[illegible] Geary Blvd ... BAyview 1-0441
Peerless Radio & Appliance Co
3721 Geary Blvd ... SU piney 1-3507

PHILCO RADIO AND TELEVISION

Philco gives you Easy Terms, prompt delivery and complete service on all Philco products. All dealers in Philco products display the Philco Radio Sign. Look for it. Philco is the Symbol of Quality for Your Home . . . Philco for Quality the World Over.

PHILCO

"WHERE TO BUY THEM"

DISTRIBUTOR

[illegible] CO APPLIANCE DIVISION
420-34 [illegible] ... UNderhill 1-4200

DEALERS

[illegible] CO 1619 Polk ... ORdway 3-4200
CITY OF PARIS
Geary & O'Farrell ... UNderhill 1-2100
Dave's Radio & Television
1651 Polk ... GRaystone 6-1262
FRED GUD CO 2204 Chestnut ... JEfferson 7-2540
Lang J E & CO Inc
1175 Market ... HEmlock 1-1100
Progressive Radio & TV
3473 3501 Mission ... VOlunteer 6-0913
Sherwood-FOLEY CO
310 Market ... SU piney 1-4040
WARNER FURNITURE CO
1241 Market ... UNderhill 1-4477

Pioneer Radio & Television
2707 Berkeley ... ORdway 1-7222
Progressive Radio & TV 3473-3501 Mission ... VOlunteer 6-0913
PYRAMID RADIO 1339 Sutter ... WEbster 1-4748

RCA BATTERIES & TUBES—

DAVE'S RADIO & TELEVISION
1651 Polk ... GRaystone 6-1262

Would you like to get your share of business from customers in your neighborhood? Then why not advertise in the Classified Telephone Directory? Simply call the Business Office of the telephone company and ask for the Directory Advertising Representative. He will help you plan a sales-building message.

RCA VICTOR

TELEVISION
Radio, Phonographs
Tube, Accessories
Records

World Leader in Radio, First in Television and Radio, First in Records.

"WHERE TO CALL"

DISTRIBUTOR

MEYERS LEO J CO
33 Gough ... MArket 1-3400

DEALERS

A & B Varnes Electric Co
4134 Geary Blvd ... EXeter 2-9600
Ace Radio Co 2267 Market ... UNderhill 1-7525
Dave's Appliance Radio & TV Co
1651 Polk ... GRaystone 6-1262
GOLDSTEIN'S RADIO & SERVICE
2100 Market ... UNderhill 1-7200
GUTT OF PARIS
Geary & Stockton ... DOnner 2-4000
Harry's Radio & Television
1651 Polk ... GRaystone 6-1262
FRED GUD CO 2204 Chestnut ... JEfferson 7-2540
Hansen Service Co
2760 Judah ... OVerland 1-6272
Gutterman Co 2nd Floor ... GA mkt 1-4288
HOFFMAN CLOTHES & RADIO CO
1201 Market ... UNderhill 1-2100
KAPLAN'S RADIO & TELEVISION
2400 Geary Blvd ... BAyview 1-3300
Kahn & Quality Tire & Supply ... UNderhill 1-0600
Lang J E & CO
1175 Market ... HEmlock 1-1100
MARX-FREEMAN RADIO TELEVISION
1267 Stockton ... DOnner 2-4441
Sherwood-FOLEY CO
310 Market ... SU piney 1-4040
STANLEY'S RADIO & TELEVISION
2000 Geary Blvd ... BAyview 1-1330

Radio Stock
Service Servicing & Sales
3199 24th ... AT water 3-8812
Radio & TV Service Co
2200 Taraval ... LAkeview 1-4230
Stewart's Radio & TV 2955 Sloriway ... LAkeview 1-4230
T & D RADIO SALES & SERVICE
1570 Polk ... FI nance 6-4000
Tom's Radio Service
2000 San Bruno Av ... JUniper 3-2000
U P Radio & Electric Co
1284 Market ... UNderhill 1-4200
UNIVERSAL-FOLEY CO
310 Market ... SU piney 1-4040

SENTINEL TELEVISION AND RADIO

Sentinel
Window Shades
Shades Cleans and Hangs Them Today
Automatic Tuning
Modern As Tomorrow
Alive As Today

"WHERE TO BUY IT"

DISTRIBUTORS

BERNHILL S S CO 216 4th ... SU ter 1-4224

DEALER

Vincent Radio & Television Service
2254 Mission ... VOlunteer 6-7575

SERVICE CENTER
216 Fillmore ... WEbster 1-4712
Service Radio Corporation 1397 Post ... GRaystone 6-7826
Shaw Electric Co 2437 Mission ... VOlunteer 6-7575
Sherry Radio & Television
2954 Sutter Bldg Mkt Phone 5-0000
Singer Dispatch & Radio Co
1247 Fillmore ... FI nance 6-4000
STANLEY'S RADIO & TELEVISION SERVICE
2045 Irving ... SU nset 1-4000
Sutter Radio & Music Co
2796 Mission ... VOlunteer 6-7575
Symonds Appliance & Radio
2000 Geary Blvd ... BAyview 1-1330
Tom's Radio Service
4700 Mission Bay Dist ... FI nance 6-4000
Tuft's Radio Electronic Shop ... VA mkt 2-5000
Union Furniture & Radio Shop
70 Van Ness Av ... UNderhill 1-0400

WESTINGHOUSE RADIO—

DISTRIBUTORS

WESTINGHOUSE ELECTRIC SUPPLY
CO 111 Sutter Av ... DOnner 1-7
Wing Sam Ark Bldg ... GRaystone 6-7
(Continued from Page)

SAN FRANCISCO'S LARGEST EXCLUSIVE AUTO RADIO HOUSE

SALES & REPAIR

Fast Drive-in Service on All Makes of Car Radios . . .

Specialists in FOREIGN CARS

Easy Credit Terms Available

ALL WORK GUARANTEED

280

CAR RADIO SERVICE

280 Valencia Near 14th St.

MArket 1-6783

DEPENDABLE TELEVISION and RADIO SERVICE

METER REPAIR SERVICE

Pleasant 5-3874

RADIO TEST EQUIPMENT

PACIFIC SALES CORP.

RADIO SERVICE

HOME & AUTO - ALL MAKES

City-Wide Pick-Up & Delivery

HI FIDELITY

SALES — SERVICE — INSTALLATION BY EXPERTS — FULLY CAPABLE WITH YEARS OF EXPERIENCE WORK ABSOLUTELY GUARANTEED

★ **PEERLESS** ★

RADIO & APPLIANCE CO.

SKyline 1-8022

AUTO RADIOS

Exclusively

★ DRIVE-IN SERVICE

Custom Built Radios for All Cars

HOURS:

Open Daily 8 A.M. - 6 P.M.

Sundays 10 A.M. - 4 P.M.

SERVICE WHILE-U-WAIT

UNderhill 3-5145

1104 BRYANT ST. AT 9th

AUTO RADIO SERVICE

AUTO RADIO REPAIRS

Factory Authorized Station

ALL MAKES CAR RADIOS AND PARTS

SERVICE RADIO

OLeytona 4-7816

RADIO REPAIRS

City Wide

Pick Up & Delivery

GIFFILLAN — HALLICRAFTERS

TRAV-LER

Specializing in RECORD CHANGERS

S & M Radio

FI 7-6301

DRIVE-IN SERVICE

Service on Radios & TV's

Any Make or Model

ALL WORK & PARTS GUARANTEED

AUTHORIZED MOTOROLA SALES & SERVICE

BRIDGE RADIO & TELEVISION

SKyline 2-2348

4327 Geary Blvd., Bet. 7th & 8th Aves.

DRIVE-IN SERVICE

SALES — INSTALLATION

SERVICE WHILE YOU WAIT

Custom Built Radios for All Cars

FACTORY AUTHORIZED WARRANTY

ESTIMATES GLADLY GIVEN

OLeaway 3-6200

BUD FISKE CO.

1610 Polk

(Bet. Van Ness & Franklin)

Radio Dealers—(Cont'd)

SMITH RADIO

"WHERE TO BUY THEM"

DISTRIBUTOR

DEALERS

Radio & Electronic Equipment—Marine

Radio Film' Agents

Radio Dealers—See Radios—Dealers

The Yellow Pages save you time.

Radio Schools—See Schools

Radio Servicing

Many buyers turn to the Yellow Pages first.

Railroad Equipment & Supplies—(Cont'd)

MOSER — DAYTON — CARPENTER
RAILROAD TRACK MATERIAL

RAILROAD TRACKS
Constructed — Repaired
& Maintained
NEW & RELAY RAILS
Switches — All Track
Accessories
Spikes Bars — Tie Plates
Spikes — Bolts

NEW AND RELAYING RAIL
CARS & LOCOMOTIVES
Track — Car — Wheel Boring

RAILROAD TRACKS
Constructed — Repaired
& Maintained
NEW & RELAY RAILS
Switches — All Track
Accessories
Spikes Bars — Tie Plates
Spikes — Bolts

Railroads—Whole & Hdy

Ranges

MACHINERY DUDDY BEARINGS
Steel Heavy Duty Bridge Bumper

Ranges & Stoves—Dealers

BUILT-IN RANGES
ALL POPULAR MAKES
GAS AND ELECTRIC

DISTRIBUTOR
CALIFORNIA ELECTRIC SUPPLY CO

Advertise here—it pays.

BRIDGE, BEACH & CO.
"ROCKS" & "SUPERIOR" GAS RANGES
"ECONOMY" HOTEL RANGES
OFFICE & WAREHOUSE

Ranges & Stoves—Dealers—(Cont'd)

PROGRAMIC ELECTRIC RANGES—

SALES & SERVICE

GENERAL ELECTRIC RANGES

"WHERE TO CALL"

SALES & SERVICE DEALERS

SALES DEALERS

Ranges & Stoves—Dealers—(Cont'd)

GIBSON ELECTRIC RANGES

SEE THE NEW ELECTRIC RANGES WITH THERMADIAL
Gibson
Since 1877
"WHERE TO BUY THEM"
DISTRIBUTOR
SERVICE ONLY

(Continued from Page)

Party Line Pointers:

1. Space your calls instead of making a whole series.
2. If yours is an emergency call and the line is in use, explain the circumstances to the person using the line.
3. If you are calling from a dial telephone always make certain the line is clear before you dial.
4. When the children use the telephone, ask them to be considerate, too.
5. Replace the receiver properly when you finish your call.

GUARANTEED STOVE REPAIRS
★ ALL MAKES ★ ALL MODELS
AUTOMATIC CONTROLS · THERMOSTATS
Expert Installations
PROMPT SERVICE
ALL WORK GUARANTEED
EXPERIENCED MECHANICS
New & Used Stoves Bought & Sold
WAlnut 1-1447
RELIABLE STOVE EXCHANGE
"Satisfied Customers for More Than a Quarter Century"
756 McALLISTER

Range & Stoves
Gas & Electric
• WESTINGHOUSE
• O'KEEFE & MERRITT
• VICTORIA HOLLY
• GENERAL ELECTRIC
• FRIGIDAIRE
GERNHARDT STROHMAIER CO.

UNDERCOVER STUFF
To keep blankets soft and fluffy between launderings, brush with a whisk broom toward the binding—never across the blanket.

Ranges & Stoves-Dealers-(Cont'd)

HOTPOINT ELECTRIC RANGES

Hotpoint

"WHERE TO BUY THEM"

DEALERS

A & E Home Electric Co ..... Elwyn 6-9999
GEORGE PLUMBING CO ..... Mi 00 6-0000
FAMILY FURNITURE CO ..... Ulbrich 1-3000
Grand Appliance Company ..... Ulbrich 1-7778
Golden Gate T V & Appliances ..... Ulbrich 1-3967
LYONS ELECTRIC CO ..... WE st 1-0100
Mart Mayers Tire Co and Sperry ..... Ulbrich 1-3001
MODERN APPLIANCE CO ..... Ulbrich 1-4000
Nichols Furniture Store ..... Ulbrich 6-0150
RICHARDS K E CO ..... Ulbrich 1-3774
Sale Hardware 3690 Post ..... Wilbur 1-0000

AUTHORIZED SERVICE

GENERAL APPLIANCE COMPANY ..... Ulbrich 1-7778

DISTRIBUTOR

GRAYSON ELECTRIC CO ..... Mi rket 1-0100

House Of Kerman 130-1000 ..... Ulbrich 3-3000
Jackson L. E Homeowners Co ..... Ulbrich 1-7001

KELVINATOR ELECTRIC RANGES—

DISTRIBUTORS

KELVINATOR DIVISION-AMERICAN MOTORS SALES CORP ..... Ulbrich 6-0000

DEALER

MODERN APPLIANCE CO ..... Ulbrich 1-4000

LAUNDERS & SAVORETTE

Distributors for Northern Calif.
THERMADOR ELECTRICAL APPLIANCES
L & H CUSTOM-BUILT ELECTRIC COOKING

LECTRO-HEAT ELECTRIC RANGES—

DEALERS

RAPHAEL'S 1400 Jones ..... Mi rket 6-7670

MAGIC CHEF GAS RANGES

"WHERE TO BUY THEM"

DEALERS

Eisenhower Gas ..... Ulbrich 1-7000
1600 Carlton Avenue ..... Ulbrich 1-7000
Universal Heating Co ..... Ulbrich 1-7000
1st West Point Av. Ulbrich 1-7000
Yukon Appliance Co ..... Ulbrich 1-7000
3471 Wilson ..... Mi rket 1-0000

Here's how you may be sure of getting your party more often when you dial:

1. Look up your number in the latest directory.
2. Listen for the steady hummm of the dial tone.
3. Keep your eye on the dial.
4. Wait a minute before you decide your party isn't home.

Warm Room & Furniture ..... 2419 Lambert Ulbrich 6-0000

MAYTAG GAS RANGES

Maytag

"WHERE TO BUY THEM"

WHOLESALE DISTRIBUTORS

MAYTAG WEST COAST CO ..... Elwyn 6-0700

DEALERS

Colma Hardware & Furniture Co ..... Plum 0-0000
DAVE'S RADIO & TV SERVICE ..... Ulbrich 1-7000
EASTERN GOODS & GIFT SHOP ..... Ulbrich 1-0000
GENERAL CARPET & FURNITURE CO ..... Ulbrich 1-0000
Glenn Rubbish Furniture Co ..... Ulbrich 1-0000
Glenn Rubbish Furniture Co ..... Ulbrich 1-0000
HARTWIG CO THE ..... Ulbrich 1-0000
Hartwig Furniture Co ..... Ulbrich 1-0000
997 West Av 12000 San Leandro
Prices independently verified by
Purchasing Authority
S F Store
1234 Third—City Council
Ask Salesman for Difference

COMMERCIAL GAS RANGES

Occidental

Since 1900

Recognized for three generations
for Quality and Good Taste

"WHERE TO BUY THEM"

MANUFACTURER

DEALERS

A 1000-RITE & SONS ..... Ulbrich 1-0000
A & E Home Electric Co ..... Ulbrich 1-0000
Advanced Home Furniture ..... Ulbrich 1-7000
Brown & Schmidt Furniture Co ..... Ulbrich 1-0000
Bruce's Appliance Center & T V Co ..... Ulbrich 1-0000
CRUMPS FURNITURE & APPLIANCE CO ..... Ulbrich 1-0000
CALLAHAN Furniture Store ..... Ulbrich 1-0000
FOSTER FURNITURE CO ..... Ulbrich 1-0000
GALLI FURNITURE & APPLIANCE CO ..... Ulbrich 1-0000
Golden Gate T V & Appliances ..... Ulbrich 1-0000
HALLIE E CLOTHIER (Furniture) CO ..... Ulbrich 1-0000
HART T & SON ..... Ulbrich 1-0000
Hartwig Home and Appliances ..... Ulbrich 1-0000
Hartwig Street Furniture Co ..... Ulbrich 1-0000
HILLTOP FURNITURE CO ..... Ulbrich 1-0000
HOOPER CARPET & FURNITURE CO ..... Ulbrich 1-0000
Hoffman Furniture Co ..... Ulbrich 1-0000
Hoffman Furniture Co ..... Ulbrich 1-0000
Hoffman Furniture Co

Ranges & Stoves-Dealers-(Cont'd)

WELBILT BBH THERMAL GAS RANGES—

DISTRIBUTOR

WELBILT STOVE CO
Gas and Coke Water Supply Co Inc
2141 A Polk at Chestnut ..... Walnut 4-2075

WESTERN HOLLY GAS RANGES

Queen of the Western Ranges
THE RANGE WITH THE ROUND WINDOWS
Western-Holly

"FOR INFORMATION CALL"

A & B Vernon Electric Co
4134 Geary Blvd ..... EXeter 2-5493
Dolan Harrah Furniture Co
1210 Polk ..... GR Anex 1-4343
GALLI FURNITURE & APPLIANCE CO
1200 Valencia ..... Mission 7-5111
GERNHARDT-STRONGARM CO
Mission & 16th ..... Mission 7-0224
Main Marina Tire Co 999 Geary ..... GRaney 2-3441
HOLLOWAY-LOWENBERG FURNITURE & APPLIANCES
1704 Fillmore ..... WE ster 1-0660
WALDEN FURNITURE CO
2245 Mission ..... MI ssion 7-0477

WESTINGHOUSE ELECTRIC RANGES—

DEALERS

DAVE'S RADIO & TELEVISION
1651 Post ..... GRaystone 4-1363
MODERN APPLIANCE CO
Sales Service-Parts
3333 Mission ..... OXford 1-4200

AUTHORIZED FACTORY SERVICE

RAGS APPLIANCE SERVICE
560 Fourth ..... Sutter 7-0940

Ranges & Stoves-Refinishing

See Appliances, Household-Refinishing

Ranges & Stoves-Repairing

ALBERT & CASSIN APPLIANCE SERVICE CO
Al Vernon Factory Ranges Repaired
2111 Geary Bl ..... WAlnut 1-4665

ARMITAGE ELECTRIC RANGE REPAIR
WE SERVICE ALL MAKES — ALL MODELS
Gas & Electric Ranges — Refrigerators
Washers — Ironers & Dryers
1797 Union ..... PRospect 6-0086

APPLIANCE SERVICE CO
Complete Modern All Major Appliances
27 Sanchez Near 21st ..... PLaza 5-3051

ASSOCIATED STOVE SERVICE
2156 Geary ..... TUxedo 5-6310
See Advertisement This Page!

B & W Stove Installation & Repair Service
582 Pennsylvania Av ..... MIssion 8-1365

BARKER STOVE SERVICE
Specializing in
Thermostat & Oven Control
Stoves, Heaters Connected & Repaired
1830 Whalley ..... SKyline 1-0415

The Yellow Pages save you time.

BURNER BURNED OUT?
USE
Monotubes
ELECTRIC RANGE
UNIT REPLACEMENTS
HEmlock 1-4686
TX Easy to clean
A unit with overall
Heat of Every Variety
Portion ... MODERNIZE
Today - Call Us for
Free Consultation
WASHING MACHINE PARTS CO.
40 RHODE ISLAND

Ranges & Stoves-Repairing-(Cont'd)

BAY LINE APPLIANCE SERVICE
Expert & Service All Makes
Electric & Gas Ranges — Water Heaters
S.F. — East Bay — Marin — Peninsula
652 Fulton ..... MIssion 1-1726

CRANE S F
City Stove Service
Stove Water-Circuit-Conditioning
101 Monroe Wy ..... GRaystone 7-0220

CRESTLINE & G-I RANGE SERVICE
ALL MAKES OF RESTAURANT RANGES
Cleaned — Repaired — Rebuilt
Charcoal Broilers Refurbished
624 Polk ..... GRaystone 3-0440

DAVE'S JOBS O'
RESTAURANT
RANGE REPAIRS & SERVICING
COMPLETE CLEANING & REBUILDING
OF ALL MAKES OF RANGES
Between 24 & 26
111-5 Park ..... ELkhorn 3-7911

FRANK'S STOVE SERVICE
Stoves & Heaters Repaired
Oven Controls Adjusted
2136 Mission ..... MIssion 7-8319

FRIGIDAIRE ELECTRIC RANGE SERVICE—
ARMITAGE ELECTRIC RANGE REPAIR
1797 Union ..... PRospect 6-0086

GERNHARDT-STRONGARM CO
Stoves & Ovens ..... MI ssion 7-0224

GOTTHOFF ELEVATOR RANGES—
GARDNER ELECTRIC CO
Commercial Only
100 Pacific ..... EXbrook 2-4252

KENMORE RANGE SERVICE—
SEARS ROEBUCK & CO
Appl. & Tinsmith ..... VIsitacion 6-0800
Angelo Tortorich & Northern Cal ..... GRaystone 3-5761

Ranges & Stoves-Repairing-(Cont'd)

MARINA STOVE & FURNITURE
2618 Lombard ..... PI nkney 6-0404

MILLER BROS STOVE & HEATERS
CONNECTED AND REPAIRED
Thermostatic Work
3623-18th ..... UNderhill 3-1712

Miller Bros The Stovemen
3623-18th ..... UNderhill 3-1712
(See Advertisement This Page)

RANGE P J SERVICE
GUARANTEED STOVE REPAIRS
All Makes — All Models
THERMOSTAT & OVEN CONTROLS
ADJUSTED
QUALIFIED EXPERT
SALES
Prompt — Honest — Dependable Service
2300 16th Av ..... LIberty 6-4722

RELIABLE STOVE EXCHANGE
756 McAllister ..... UNderhill 3-1447
(See Advertisement This Page)

SLOANS SERVICE 2700 Bryant ..... ATwater 2-3313
(See Advertisement This Page)
United Electric Appliance Radio & TV
1040 Oak HEmlock 1-7439

UNIVERSAL ELECTRIC RANGE SERVICE—
ARMITAGE ELECTRIC RANGE REPAIR
1797 Union ..... PRospect 6-0086

Washing Machine Parts Co
40 Rhode Island HEmlock 1-4686
(See Advertisement This Page)

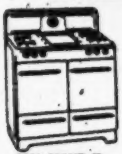
WESTINGHOUSE ELECTRIC RANGES—

FACTORY AUTHORIZED SERVICE

SPEEDWAY REFRIGERATION & APPLIANCE
SERVICE 630 Ellis ..... PRospect 6-3040

Listen for the dial tone before you start to dial. It means that the equipment is ready to receive your call.

STOVES & WATER HEATERS
INSTALLED, REPAIRED & MOVED



SPECIALISTS IN THERMOSTATS & AUTOMATIC CONTROLS

SLOANS SERVICE

ATwater 2-3313

2700 BRYANT ST.

WE INVITE INSURANCE ADJUSTMENTS

STOVES WATER HEATERS

Installed - Moved - Repaired Thermostats

MILLER BROS.

The Stovemen

UNderhill 3-1712

Gear. Service "Stoves & Homes"

Established 1918

3623-18th St.

Guaranteed

STOVE REPAIRS

ALL MAKES - ALL MODELS

Specializing on

★ AUTOMATIC CONTROLS

★ THERMOSTATS

EXPERT INSTALLATIONS
- Prompt Service
- Experienced Mechanics
- All Work Guaranteed

New & Used Stoves Bought & Sold

WAlnut 1-1447

Reliable Stove Exchange

"Satisfied Customers for More Than a Quarter Century"

756 McALLISTER

STOVE
Installations
Repairs

Specialists in

O'KEEFE & MERRITT
WEDGEWOOD
OCCIDENTAL
MAGIC CHEF
WESTERN HOLLY
GAFFERS & SATTLER
TAPPAN
And All Other Makes

A Wise Choice for STOVE REPAIRS

City-Wide Service
These Points

★ 24th & MISSION
★ 10th AVE. & GEARY
★ 20th AVE. & IRVING
★ CHESTNUT & FILLMORE
★ OCEAN AVE. & MIRAMAR AVE.

Call
TUxedo 5-6310

All Work Guaranteed
Si Parla Italiano

ASSOCIATED STOVE SERVICE

1156 GEARY

Featuring the Finest

4u TELEVISION
Sales and Service

Now Showing 1962 Models

Dave's
RADIO & TELEVISION
1651 POLK ST.

SKINNER HIRSCH & KAYE

For the Finest
In Television
Sales - Service

SYLVANIA-CHELSEA
HAND PAINTED
CHINESE, CLASSICS
also
Modern & Provincial

TELEVISION
RADIO... HI-FI
PHONOGRAPHS

FINEST IN
COLOR SETS

GArfield 1-7370

Skinner Hirsch Kaye
239 GRANT AVE. SAN FRANCISCO 8, CA.

WE SELL
FOR LESS

YOUNG BROS.

AUTHORIZED
SALES &
SERVICE

2 LOCATIONS
19th & Minden - 2301 Minden
5522 Geary Blvd.
Between 19th & 20th Aves.

YOUNG BROS.
TV STORES

Telephone Service

Telephone Supplies

Television Dealers

SALES & SERVICE

USED T.V.'S

(Continued Next Page)

Television Dealers—(Cont'd)

"WHERE TO BUY IT"

DISTRIBUTOR

DEALER

AUTHORIZED SERVICE

Sales & Service
ALL NATIONAL MAKES
DAY OR NITE
CITY-WIDE CALLS

"WHERE TO BUY THEM"

CBS TV SETS

DISTRIBUTOR

DEALERS

WHOLESALE DISTRIBUTORS

A Directory Advertising Representative will be glad to help you prepare a Classified Directory advertisement that will bring you more business. You can reach him by calling the Business Office of the telephone company.

AUTHORIZED DEALERS FOR SYLVANIA

DAY & NIGHT
Television Service Co.
1232 HAIGHT ST.

$3.50
Plus Parts for Service call on any make or model

UNderhill 3-0793

24-HR. SHOP REPAIRS

Open 9 A.M. - 10 P.M. Including Sunday

AUTHORIZED DEALER
ADMIRAL — MOTOROLA — SENTINEL — PACKARD-BELL — GENERAL ELECTRIC

DAY or NIGHT
SERVICE & SALES
10 A.M. to 10 P.M.
7 DAYS A WEEK

EVANS TV GUARANTEED SERVICE QUALITY RESULTS

ADMIT TV & CHECK TUBES WITH A TESTER IN YOUR HOME $1.95 PLUS PARTS

20 Years Electronic Experience

WRITTEN GUARANTEE ON ALL MAKES

WAlnut 1-1659

AUTHORIZED DEALERS FOR SYLVANIA

DAY & NIGHT
Television Service Co.
1232 HAIGHT ST.

$3.50
Plus Parts for Service call on any make or model

UNderhill 3-0793

OPEN 9 A.M. - 10 P.M. Including Sunday

TV
UNITED
SALES SERVICE CO.

• PHILCO • ZENITH • MOTOROLA • SENTINEL
FREE HOME DEMONSTRATION
"We Sell the Best & Repair the Rest"

EASY TERMS

VAlencia 4-3934

TV & RADIO REPAIR

UNITED TELEVISION SERVICE CO.
3830-24th Street Near Bryant

Hansen's
PARKSIDE TV
COUNTY WIDE SALES & SERVICE

DU MONT TELEVISION Capehart
Installation & Service

Service Available Evenings — Sundays On All Makes — Covering the Entire City
RCA Victor Authorized Dealer — Your Warranty Is Good Here
SERVING SAN FRANCISCO FOR OVER 13 YEARS
The Best Costs No More at

LOmbard 6-2684

9534-47th AVE. 33 VICENTE

Television Dealers—(Cont'd)

QUALITY TELEVISION AND SERVICE

CROSLEY

"WHERE TO BUY THEM"

DISTRIBUTOR

DEALERS

Please wait till you hear the dial tone . . . then dial.

Authorized Dealers for Motorola

DAY & NIGHT
Television Service Co.
1300 HASHBY DR.

$3.50
Plus Parts for service call on any make or model

UNderhill 3-0783

OPEN 9 A.M. — 10 P.M.
Including Sunday

Carter's
Admiral
SALES & SERVICE
RADIO & HI-FI
TELEVISION

LOmbard 4-1184

1855 IRVING

"WHERE TO BUY IT"

DEALERS

DISTRIBUTOR

PARTS & SERVICE

"FOR INFORMATION CALL"

DISTRIBUTORS

DEALERS

Party Line Pointers:

1. Space your calls instead of making a whole series.
2. If yours is an emergency call and the line is in use, explain the circumstances to the person using the line.
3. If you are calling from a dial telephone always make certain the line is clear before you dial.
4. When the children use the telephone, ask them to be considerate, too.
5. Replace the receiver properly when you finish your call.

TV

"WHERE TO BUY THEM"

DEALERS

DISTRIBUTOR

DEALERS

AUTHORIZED FACTORY SERVICE

Check the Yellow Pages for WHO sells WHAT.

"WHERE TO BUY THEM"

DISTRIBUTOR

DEALERS

CIVIC CENTER

DOWNTOWN DISTRICT

FILLMORE DISTRICT

HAIGHT-ASHBURY DISTRICT

HAIGHT-DIVISADERO DISTRICT

MARINA DISTRICT

MISSION DISTRICT

NOB HILL DISTRICT

NORTH BEACH DISTRICT

POLK ST. DISTRICT

RICHMOND DISTRICT

SUNSET DISTRICT

UPPER FILLMORE DISTRICT

KAYE-HALSEBY TELEVISION—

DEALERS

If you have a doubt about it, look up the number in the latest telephone book before you call.

(Continued from Page)

Television Dealers-(Cont'd)

MAGNAVOX TELEVISION SALES

Magnavox

"WHERE TO BUY THEM"

FACTORY BRANCH

AUTHORIZED DEALERS

HARVEY TELEVISION

MOTOROLA TV

"WHERE TO BUY THEM"

DISTRIBUTOR

DEALERS

OLYMPIC TELEVISION

DISTRIBUTORS

DEALERS

PACKARD-BELL TELEVISION-RADIO

"WHERE TO BUY THEM"

DISTRIBUTORS

FACTORY SERVICE DEPARTMENT

DEALERS

PHILCO

"WHERE TO BUY THEM"

DISTRIBUTOR

DEALERS

RCA VICTOR

"WHERE TO CALL"

DISTRIBUTOR

DEALERS

SCARE AWAY RUST

To prevent rust in trash or garbage cans, pour melted paraffin (or old candles) in bottom of container. Rotate to coat bottom and sides.

Good party-line neighbors are considerate party-line users. Remember these golden rules:

- Space your calls instead of making several without a break.
- Talk only as long as necessary on each call.
- When you finish talking replace the receiver properly.
- Make certain, if you are using a dial telephone, that the line is clear before you dial.
- Ask your youngsters to be considerate, too.

The Classified Telephone Directory tells purchasers where to buy your goods.

Behind on orders? Let handy Classified introduce the suppliers you need. It's fast. It's convenient. Wise buyers say there's nothing like the Yellow Pages of your telephone book for getting in touch with almost everyone around who sells things, fixes things, does things. Try Classified once . . . you'll use it often.

(Continued from Page)

Television Dealers-(Cont'd)

RCA VICTOR

PARK-PRESIDIO RADIO TELEVISION

PIONEER HOME SUPPLY CO

RADIO & T V SERVICE CO

SEWINGMACHINE-FEET CO

SINGER ELECTRIC & RADIO CO

SKINNER RADIO & SAFE

STANLEY'S RADIO & TELEVISION

STYLES FURNITURE CO

SUGARMAN E INC

SUNSET TELEVISION CENTER

YOUNG BROS TELEVISION STORES

ZAIS HENRY H FURNITURE CO

RAYTHEON TELEVISION

ENTIRELY NEW KIND OF TV. Revolution in Color ... Light ... Control ... Sharpness ... Large-screen Projection ... Rear-screen ... Low-cost ... Simplified ... Also "Custom" series, and 630 Commercial TV.

RAYTHEON

"WHERE TO CALL"

DISTRIBUTORS

LAPKIN FOR COMPANY

DEALERS

A & R Radio

Bel-Air Zone's Service Center

STANTON ELECTRIC CO

C-KLEER TELEVISION INC

SERVICE

Burnham's Radio

Harvey Radio & Television

RICHMOND RADIO & TELEVISION CO

SAN BRUNO TV & APPLIANCES

SEGAL MELVIN

Television Service

SENTINEL TELEVISION AND RADIO

Sentinel Radio Service Calls and Set Tests Antennas & Tuning

Sentinel

"WHERE TO BUY IT"

DISTRIBUTOR

SCHNELL R B CO

DEALERS

A-1 TELEVISION & RADIO SERVICE

A B C RADIO & TELEVISION CO

Barnes Radio & Television

DON'S TV SERVICE

Hampton Electric & Radio Co

SAPPHIRE TV & RADIO SERVICE

SHERIDAN TELEVISION SERVICE

SHIPP RADIO & TELEVISION

SPITTER RADIO & TELEVISION

SPITTER TELEVISION SERVICE CO

Valley Radio & Television

Zahgers T V & Radio Sales & Service

SENTINEL SERVICE FILM Phillipsons

SHERMAN CLAY & CO

LEADING MAKES TELEVISION and TV-RADIO-PHONOGRAPH Combinations

Sherman Clay & Sutter

Wiremold Stores

SIEMON ELECTRIC & RADIO CO

SKINNER RADIO & SAFE

BLANKE W & J Also Butler

SPARTON RADIO TELEVISION

Sparton

"WHERE TO BUY THEM"

DEALERS

Butler's TV & Appliance Co

STROMBERG-CARLSON TELEVISION

SALES AND SERVICE

Stromberg-Carlson

"WHERE TO BUY IT"

DEALERS

Butler's TV & Appliance Co

SKINNER & SAFE

STYLES FURNITURE CO

SUNSET TELEVISION CENTER

SYLVANIA TELEVISION

Advance — electronic pioneer — presents the SYLVANIA of the world's finest sets with HALOLIGHT television sets, featuring exclusive Halolight for clearer, brighter pictures and greater viewing comfort.

"WHERE TO BUY IT"

DISTRIBUTOR

THOMPSON & HOLMES LTD

DEALERS

A-1 Radio & Television

Ball Van Dorn Service Center

C & H RADIO T V SERVICE

Carl Home Furnishing

CALTRONICS TV SALES & SERVICE

CHRISTOPHER TELEVISION SALES

DAY & NIGHT TELEVISION

DAY & NIGHT TELEVISION SERVICE CO

Electronic Radio & Television

GRANT'S RADIO & TV

HARRY'S RADIO & TV SERVICE

HOME ELECTRONICS CO

HOWARD'S RADIO & TV

LYNN ELECTRONICS CO

MARK'S RADIO & TV SERVICE

MARTIN'S RADIO & TV SERVICE

MAYFAIR RADIO & TV

MIDWAY RADIO & TV SERVICE

MODERN RADIO & TV

MOORE'S RADIO & TV SERVICE

NEIGHBORHOOD TV SERVICE

PARK RADIO & TV SERVICE

PARKSIDE RADIO & TV

PETERSON'S RADIO & TV

PIONEER RADIO & TELEVISION

RADIO & TV SERVICE CO

RAY'S RADIO & TV SERVICE

RICHMOND RADIO & TELEVISION CO

SAN BRUNO TV & APPLIANCES

SEGAL MELVIN

SHERMAN CLAY & CO

SIEMON ELECTRIC & RADIO CO

SKINNER RADIO & SAFE

SPARTON RADIO TELEVISION

STANTON ELECTRIC CO

STANLEY'S RADIO & TELEVISION

STYLES FURNITURE CO

SUGARMAN E INC

SUNSET TELEVISION CENTER

SUNSET TELEVISION SERVICE

TRAV-LER

Pioneer for Performance and Value Since 1921

TRAV-LER

America's Greatest Television & Radio Value

"FOR INFORMATION CALL"

DISTRIBUTORS

TRAV-LER RADIO CORP

DEALERS

DAY & NIGHT TELEVISION SERVICE CO

SUPER RADIO & T V SERVICE

WESTINGHOUSE TELEVISION

WESTINGHOUSE ELECTRIC SUPPLY CO

DEALERS

EL REY RADIO & APPLIANCE

HIRSCH & SAFE SKINNER

SKINNER HIRSCH & SAFE

YOUNG BROS TELEVISION STORES

SMITH TELEVISION

Television at the finest ... with the value and features ... backed by 26 years of experience in Radio exclusively.

ZENITH

"WHERE TO BUY THEM"

DISTRIBUTORS

GARFIELD R B CO

DEALERS

A & B Home Electric Co

BAYLY APPLIANCE & FURNITURE CO

Bell's Appliance Radio & T V Co

Bruce Radio & Television

CHRISTOPHER TELEVISION SALES

DAY & NIGHT TELEVISION

DRESSER HIRSCH & SAFE

EL REY RADIO & APPLIANCE

ELLIS TELEVISION CO

GRANT'S RADIO & TV

HARRY'S RADIO & TV SERVICE

HOWARD'S RADIO & TV

HOWARD TELEVISION

KELLY'S FURNITURE CO

Kinder's Radio & Television

LAWRENCE TELEVISION

Lawrence's Radio & TV

MARK'S RADIO & TV SERVICE

MARTIN'S RADIO & TV SERVICE

MAYFAIR RADIO & TV

MIDWAY RADIO & TV SERVICE

MODERN RADIO & TV

MOORE'S RADIO & TV SERVICE

NEIGHBORHOOD TV SERVICE

PARK RADIO & TV SERVICE

PARKSIDE RADIO & TV

PETERSON'S RADIO & TV

PIONEER RADIO & TELEVISION

RADIO & TV SERVICE CO

RAY'S RADIO & TV SERVICE

RICHMOND RADIO & TELEVISION CO

SAN BRUNO TV & APPLIANCES

SEGAL MELVIN

SHERMAN CLAY & CO

SIEMON ELECTRIC & RADIO CO

SKINNER RADIO & SAFE

SPARTON RADIO TELEVISION

STANTON ELECTRIC CO

STANLEY'S RADIO & TELEVISION

STYLES FURNITURE CO

SUGARMAN E INC

SUNSET TELEVISION CENTER

SUNSET TELEVISION SERVICE

TRAV-LER

WESTINGHOUSE TELEVISION

YOUNG BROS TELEVISION STORES

The Telephone Hour, heard over N.B.C. every Monday night, presents outstanding musical artists for your enjoyment.

For better service, speak directly and clearly into the telephone mouthpiece.

NEWSPAPER FIREWOOD

To make a small grate or stove fire, or to kindle a big one, use old newspapers which have been rolled up tightly, soaked overnight in water, squeezed out and allowed to dry for several days. The tighter they are squeezed, the better firewood they make.

An extension telephone is a step-saver in any home.

EXPLOSION IN OVEN

If you burn the inside of the oven with an exploded potato or something, soak a cloth in ammonia and let it stay on the burned places an hour or so, after which you can scrape the spots clean without harming the enamel.

Warehouses-Public-(Cont'd)

COMPLETE WAREHOUSING SERVICE
DRAYING
POOL CAR DISTRIBUTION

WAREHOUSING
DRAYING
AND
POOL CAR DISTRIBUTION
13 Car Railroad Siding
OFFICE SPACE AVAILABLE

"FOR INFORMATION CALL"

Many buyers turn to the Yellow Pages first.

Warehouses-Field-(Cont'd)

FIELD WAREHOUSING
A National Organization

COMPLETE
INVENTORY FINANCING
SERVICE

Washers

WASHERS & GASKETS

Washing Compounds

Washing Machines-Coin Meter

COIN OPERATED
WASHING MACHINES
& DRYERS
FOR
- Apartment Houses
- Institutions
- Hotels
- Trailer Courts
- Housing Developments
- Boat Houses

CALL
UNderhill 3-0415
SERVICE DISTRIBUTORS INC.
873-7th

Washing Machines-Coin Meter-(Cont'd)

"FOR INFORMATION CALL"

ABC

"WHERE TO BUY IT"
DISTRIBUTOR

DEALERS

WHOLESALE PARTS

Washing Machines-Dealers-(Cont'd)

ALL MAKES WASHERS
SERVICED - REPAIRED

34 YRS OF SERVICE
Authorized
Sales & Service on
BENDIX - EASY - NORGE
MAYTAG - HAMILTON
We Service All Makes
But Sell Only the Best
FREE DELIVERY

DISTRIBUTORS

DEALERS

AUTHORIZED FACTORY PARTS

(Continued from Page)

Advertise here—it pays.

WHERE TO BUY IT

Maytag

The Original Maytag Sales & Service Dept.

AUTOMATIC WASHERS - IRONERS - HOME FREEZERS
MAYTAG DUTCH OVEN GAS RANGES
DRYERS - REFRIGERATORS
WATER HEATERS

We Sell It
We Deliver It
We Install It
We Guarantee It
We Have Parts for It

ALL MAKES REPAIRED
Wringer Rolls for All Makes

Buyers in Marin
Free Pick-Up & Delivery
One Mile Area

ONE YEAR GUARANTEE ON ALL WORK

Service Provide
Serving - San Francisco
Daly City - Colma
South S. F. - San Mateo

MAYTAG Sales - Service - Parts

"Where You Buy Is as Important as What You Buy"

WEST COAST WASHING MACHINE CO.

497 - 493 VALENCIA
Over 2 Million Maytags in Use

UNderhill 1-5835
or UNderhill 1-6492

WASHING MACHINES

NEW • USED

REPAIRING and REBUILDING

Call... PRospect 5-2000

or PRospect 5-3502

- A.B.C. • APEX
- AMERICAN BEAUTY
- DEXTER • EASY
- HAMILTHOT
- NORGE • NORTON
- MAYTAG • BENDIX
- SPEED QUEEN
- BLACKSTONE
- STERRO WASHERS
- 888 VAC
- UNIVERSAL
- LITTLE GIANT •
- HAMILTON
- & ALL AUTOMATICS

Wringer & Motor Specialists

ALL MAKES OF WASHERS & ELECTRICAL APPLIANCES

FREE Pick-Up & Delivery

903 O'FARRELL

CORNER OF POLK

ACCURATE APPLIANCE CO.

AUTHORIZED SERVICE AND SALES

WHIRLPOOL - MAYTAG

• ABC • CONLON • EASY • THOR

WE SERVICE AND REPAIR ALL MAKES

WASHERS • IRONERS • DRYERS

Including KENMORE - BENDIX - WESTINGHOUSE - HAMILTON

One Year Guarantee On All Work

HEmlock 1-1760

Free Estimates Established 1923

The Original

APPLIANCE SERVICE & SALES CO.

1650 MARKET

BENDIX Maytag EASY Thor

The Place to Buy

Modern APPLIANCE CO.

SALES & SERVICE

19 YEARS OF

PROMPT EXPERT SERVICE TO ALL DISTRICTS OF

- BENDIX • MAYTAG • EASY
- THOR • WESTINGHOUSE • A.B.C.
- NORGE • KELVINATOR • APEX
- HOTPOINT • BLACKSTONE • WHIRLPOOL

And Others Open 'Til 9 P.M.

INVESTIGATE OUR RENT TO OWN PLAN

Highest Trade-In Rebuilt Washers From $19.95

UNderhill 1-4050

9311 MARKET ST.

NEAR 16th ST. • NO PARKING PROBLEM

ABC Hamilton Whirlpool

Washing Machines—Dealers—(Cont'd)

BEAM WASHERS—

WASHING MACHINE PARTS CO
Authorized Factory Parts
93 Shaw Island ..... HEmlock 1-4686

Bristol's Easy Washer Shop
903 O'Farrell ..... PR esprit 5-2000

BEE-VAC WASHING MACHINES—

DEALER

ACCURATE APPLIANCE CO
903 O'Farrell ..... PR esprit 5-2000

BENDIX WASHERS & DRYERS

Your most complete choice of Automatic Laundry Equipment. Exclusive Pillow-Soft all-in-one Gas or Electric Tumble Action or Agitator Washers . . . Gas or Electric Dryers . . . Ironers.

BENDIX

"WHERE TO BUY THEM"

DISTRIBUTOR

CALIF ELECTRIC SUPPLY CO
1105 Folsom ..... Uhland 3-3939

DEALERS

A & B Vernon Electric Co
4134 Geary Bl ..... Ellgate 6-6693
Angelo's Wholesalers Unlimited
1019 Irving ..... Ortland 1-4295
BELVIEW TELEVISION CO
2815 Mission ..... Atlantic 4-7207
Bristol's Appliance Radio & T V Co
1601 Fillmore ..... Prospect 5-2000
BROOKE'S 1291 Mission ..... Market 1-4660
Calif Television & Appliance Co
45 Sanchez nr 14th ..... Mkt 1-3545
CARNEY REFRIGERATION CO
590 Valencia nr 14th ..... HEmlock 1-7545
CHARLES F 1909 Mission ..... Mkt 1-7620
DELCO OF WEST PORTAL
103 W Portal Av ..... Ortland 1-3020
GUARANTEED APPLIANCE SERVICE
1015 Irving ..... Ortland 1-4292
HAFFNER'S 1420 Irving ..... Ortland 4-4782
Long J W & Co Inc
1175 Market ..... KEarny 2-1088
MISSION CARPET & FURNITURE CO
2699 Mission nr 24th ..... Atlantic 2-5795
Modern Appliance Co
2511 Market ..... Uhland 1-4650
DISHWASHERS-FREE 60
715 Market ..... DO nr 2-4040
STARLIGHT FURNITURE CO
2211 Mission ..... Valencia 6-4363

FACTORY AUTHORIZED SERVICE

ACCURATE APPLIANCE CO
903 O'Farrell ..... Prospect 5-2000
AUTOMATIC HOME LAUNDRY SERVICE
Shu Phan
46 Clara ..... Ylcher 2-0614
BROOKE'S 1291 Mission ..... Mkt 1-4660
GUARANTEED APPLIANCE SERVICE
1015 Irving ..... Ortland 1-4292
POUND'S REFRIGERATION SERVICE
625 Duncan, Valencia 6-7737

BLACKSTONE HOME LAUNDRY EQUIPMENT—

DEALER

ACCURATE APPLIANCE CO
903 O'Farrell ..... Prospect 5-2000

FACTORY PARTS & SERVICE

ELECTRICAL APPLIANCE SERVICE CO
OF S F 1434 Howard ..... HEmlock 1-4183

BRISTOL'S APPLIANCE RADIO & T V CO
1601 Fillmore ..... Prospect 5-2000
Bristol's 1281 Mission ..... Market 1-4660

CHAMPION WASHERS—

PARTS & SERVICE

VICTORY WASHER CO
1767 Mission at 14th ..... UNderhill 3-4383

CHASE & F 1909 Mission ..... Market 1-4620

CONLON WASHERS—

WASHING MACHINE PARTS CO
Authorized Factory Parts
93 Shaw Island ..... HEmlock 1-4686

DEXTER WASHING MACHINES—

DEALER

ACCURATE APPLIANCE CO
903 O'Farrell ..... PR esprit 5-2000

AUTHORIZED FACTORY PARTS

WASHING MACHINE PARTS CO
93 Shaw Island ..... HEmlock 1-4686

Duplex Co 1281 Geary ..... GRand 1-4343
DULFER'S OF WEST PORTAL
103 W Portal Av ..... Ortland 1-1020
See Advertisement This Page

EASY HOME LAUNDRY EQUIPMENT

EASY

"WHERE TO BUY THEM"

DEALERS

A & B Vernon Electric Co
4134 Geary Bl ..... Ellgate 6-6693
ACCURATE APPLIANCE CO ..... Prospect 5-2000
903 O'Farrell
Angelo's Wholesalers Unlimited
1015 Irving ..... Ortland 1-4292
APPLIANCE SERVICE & SALES CO
1650 Market ..... HEmlock 1-1760
LACHMAN BROS
49 Ninth & 1620 ..... HEmlock 1-2300
MISSION FURNITURE STORE
2126 Turner ..... Lakeside 4-4120
Sheff's Furniture Co 2060 Mkt, 881 nr 7-4060
WAYMAN FURNITURE CO
2242 Mission ..... 881 nr 7-4477

WHOLESALE PARTS

ELECTRICAL APPLIANCE SERVICE CO
OF S F 1434 Howard ..... HE mlock 1-0182

FACTORY BRANCH

EASY WASHING MACHINE CORP
1395 Market ..... HE mlock 1-4797

AUTHORIZED FACTORY PARTS

WASHING MACHINE PARTS CO
93 Shaw Island ..... HEmlock 1-4686

East Washing Machine Corp
1395 Market ..... HE mlock 1-4797
Edwards Dishwashing Machine Co
461 S Van Ness Av ..... UN esprit 1-2640
Emporium The Gas Market ..... TU ban 7-2111
1 Stockton ..... Sutter 1-2111

FRIGIDAIRE AUTOMATIC WASHERS—

SALES & SERVICE DEALERS

BROOKE'S 1291 Mission ..... Market 1-4660
GENERAL APPLIANCE COMPANY
369 Pelt ..... Market 1-7770
JACKSON S & S 500
Irving at 20th Av SEabright 1-5615
LEE FURNITURE CO
1930 Mission ..... Valencia 6-5200
P. N. ELL BROS 2257 Irving ..... Lakeside 4-0527
SUNLAND YOUNG REFRIGERATION CORP
1450 Van Ness Av ..... GRaney 3-6822

GENERAL APPLIANCE COMPANY

Frigidaire — Maytag — General Electric
Washers — Dryers
Factory Authorized Sales & Service
369 Pelt ..... Market 1-7770

(Continued Next Page)

Dulfer's

FACTORY AUTHORIZED SALES & SERVICE

Automatic Washers & Dryers

Frigidaire General Electric Bendix Maytag Hotpoint

ORland 1-1020

103 WEST PORTAL AVE

TO FILL CRACKS

• Cracks in wooden walls, etc., can be permanently repaired by filling them with a thick paste made of approximately 1 part linseed oil, 2 parts hot glue, 3 parts whiting and 4 parts sawdust.

Washing Machines-Dealers-(Cont'd)

GENERAL ELECTRIC HOME LAUNDRY EQUIPMENT

"WHERE TO CALL"

SALES & SERVICE DEALERS

SALES DEALERS

"WHERE TO BUY IT"

DISTRIBUTOR

DEALERS

AUTHORIZED FACTORY SERVICE

DEALER

AUTHORIZED FACTORY PARTS

TO REPAIR LINOLEUM

If you have a break in the edge of linoleum, take a good-sized piece of cloth (to reach well beyond the break at all points), cover it with glue and put it beneath the linoleum. Weight it down with heavy objects until it has had time to dry and set.

Hotpoint

"WHERE TO BUY THEM"

DEALERS

AUTHORIZED SERVICE

DISTRIBUTOR

FACTORY AUTHORIZED PARTS

"WHERE TO BUY THEM"

FACTORY BRANCH

DEALER

Maytag

"WHERE TO BUY IT"

WHOLESALE DISTRIBUTOR

DEALERS

AUTHORIZED SERVICE

AUTHORIZED FACTORY PARTS

DISTRIBUTOR

KEEP LIGHT FROM MILK

Keep light from milk to prevent loss of riboflavin, its most important vitamin element. If you don't meet the milkman, leave out a covered, insulated box for bottles of milk. Remember that light hurts milk more than heat does in a short time.

NORGE

"WHERE TO BUY THEM"

DISTRIBUTOR

DEALERS

AUTHORIZED SERVICE

WHOLESALE PARTS

"WHERE TO BUY THEM"

DISTRIBUTOR

AUTHORIZED FACTORY PARTS

FACTORY PARTS & SERVICE

CENTRALIZED SERVICE

AUTHORIZED FACTORY PARTS

UNIVERSAL ELECTRIC WASHER—

SERVICE & PARTS

(Continued Next Page)

Washing Machines-Dealers-(Cont'd)

VICTORY WASHERS—
PARTS & SERVICE
VICTORY WASHER CO

WEST COAST WASHING MACHINE CO

WESTINGHOUSE LAUNDRY EQUIPMENT—
AUTHORIZED FACTORY SERVICE
RAGS APPLIANCE SERVICE
DEALERS
CHASE S F Store Movers
DAVE'S RADIO & APPLIANCE
DAVE'S RADIO & TELEVISION
FINE FURNITURE & APPLIANCE CO
DOUGLAS APPLIANCE CO
DUGANAN E INC
YOUNG GENE TELEVISION STORES

WHIRLPOOL HOME LAUNDRY
AUTOMATIC WASHERS
DRYERS - IRONERS
Whirlpool
"WHERE TO CALL"
DISTRIBUTOR
DEALERS
A VILLENTE & SONS
A & B Varian Electric Co
APPLIANCE SERVICE & SALES CO
Dalton Appliance & Television Inc
Dave's Appliance Radio & TV Co
DOUGHERTY CLEANING CO
Ewart Home Furnishings
DAVIS FURNITURE CO
GALLI FURNITURE & APPLIANCE CO
HOPKINS ELECTRIC & RADIO CO
House of Carvalho's Used Sales
LEE FURNITURE CO
Mellinger & Son
Mellin Furniture Co
Mayer Appliance Co
Mayer Furniture Store
Sorensen Bros Furniture Co
STANLEIGH FURNITURE CO
STEARNS SERVICE CO
STELLA FURNITURE CO
THOMAS REFRIGERATION CO
UNITED TELEVISION SERVICE CO
(Continued from Preceding Column)

For accurate dialing of your calls, wait a few seconds for the steady humming sound of the dial tone. Then dial each letter and numeral gently, without forcing. If you get a busy signal, please hang up before dialing again.

Washing Machines-Dealers-(Cont'd)

WHIRLPOOL HOME LAUNDRY
SERVICE
A-PARKSIDE APPLIANCE SERVICE
APPLIANCE SERVICE & SALES CO
AUTOMATIC HOME LAUNDRY SERVICE
AUTHORIZED FACTORY PARTS
ELECTRICAL APPLIANCE SERVICE
AUTHORIZED FACTORY PARTS & SERVICE

Washing Machines-Industrial

Washing Machines-Parts & Supplies, Retail

APPLIANCE SERVICE & SALES CO
BARNEY'S
BEYER SALES & SERVICE INC

Listen for the "dial tone" before you start to dial. It means that the equipment is ready to receive your call.

Washing Machines-Parts & Supplies, Wholesale

Washing Machines-Refinishing

Sun Appliances, Guaranteed Refinishing

Washing Machines-Renting

All American Furniture & Refrigeration Co
Modern Appliance Co
Pine Manor & Repair Service
VICTORY WASHERS OF
Rental Appliances Purchase Plan

Washing Machines-Repairing

A-PARKSIDE APPLIANCE SERVICE
CITY-WIDE SERVICE
EXPERT REPAIRS ON
All Makes Washers and Ironers
A-Parkside Appliance Service

The Yellow Pages — meeting place of buyers and sellers.

AUTHORIZED
SERVICE AND SALES
Whirlpool - Maytag
ABC - CONLON - EASY - THOR
We Service and Repair All Makes
WASHERS - IRONERS - DRYERS
Including KENMORE - BENDIX
WESTINGHOUSE - HAMILTON
One Year Guarantee on All Work
Estimates Free
The Original
APPLIANCE
SERVICE & SALES CO.
Established 1923
1658 MARKET
HEmlock 1-1760

Washing Machines-Repairing-(Cont'd)

A & A ABBOTT APPLIANCE CO
COMPLETE REPAIRING
ON ALL WASHING MACHINES
A & E HOME-LAUNDRY EQUIPMENT—
ALBERT & CASANI APPLIANCE SERVICE CO
A & J REPAIR SERVICE
GUARANTEED REPAIR
All Makes
WASHERS AND DRYERS
CITY-WIDE SERVICE
FREE PICK-UP & DELIVERY
CONSTANT PROMPT ATTENTION
TO CALLS
We Service Appliances of All Kinds
FREE ESTIMATES
QUICK DISPATCHING
ASSOCIATE APPLIANCE CO
ALBERT & CASANI APPLIANCE SERVICE CO
ANGELUS VACUUM CLEANER CO
APPLIANCE REGISTERED SERVICE CO
"ABSCO"
BENDIX & WHIRLPOOL
CITY-WIDE SERVICE
All Makes Repaired and Serviced
Work Guaranteed
APPLIANCE SERVICE & SALES CO
Antonio Home Laundry Service
Antonio Washer Shop
BAY LINE APPLIANCE SERVICE
INSTALL — SERVICE — REPAIR
All Makes and Models Washers & Dryers
BENDIX SPECIALIST SERVICE CO
BERNEY'S FURNITURE APPLIANCE & TV CO
Repairs on All Makes
Free Pick-Up & Delivery
All Work Guaranteed
BRUNO'S
ALL MAKES REPAIRED
FACTORY AUTHORIZED
BENDIX - PHILCO-BENDIX
(Continued from Page)

The Yellow pages save you time.

[Title of District Court and Cause.]

AFFIDAVIT OF WILLIAM M. CASEY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

State of California
City and County of San Francisco—ss.

William M. Casey, being first duly sworn, deposes and says:

1. From August 31, 1954, I have been and now am sales manager for Admiral Distributors, San Francisco Division, a division of Admiral Corporation. Said division now is and has been at all times herein mentioned the distributor in the City and County of San Francisco for radios, television sets, refrigerators, air conditioners and electric ranges manufactured by the defendant Admiral Corporation. I have personal knowledge of the retailers who are selling or have at any time herein mentioned sold said products at retail in San Francisco.

2. At all times since August 31, 1954, there have been a minimum of 150 stores located in San Francisco selling one or more of said Admiral products at retail including, among the larger stores: Macy's, Hale Bros. and Chas. Brown. 118 of these dealers have sold said products continuously since August 31, 1954. On February 23, 1956, there were no less than 195 retail stores located in San Francisco selling one or more of said Admiral products.

3. At all times since August 31, 1954, there have

been a minimum of twenty stores located in the Mission District of San Francisco selling one or more of said Admiral products at retail. On February 23, 1956, there were 36 such retail stores located in said Mission District selling one or more of said Admiral products, to-wit:

All Makes TV, 5453 Mission
Apartment Supply, 554 Mission
Assoc. Home Furnishers, 1370 Mission
Bay City Enameling, 49 Shotwell
Bechler & Schwab, 140 Valencia
Belview TV, 5515 Mission
Bond Home Furnishings, 2224 Mission
Cherry Burrell, 2675 Folsom
C.S.E. TV, 3895 18th
Carney Refrigeration, 590 Valencia
Christophe's, 2388 Mission
City Wide Refrigerator, 1007½ Valencia
Dan's Sales & Service, 600 Potrero
David Williams, 1585 26th
Estrada Furniture, 3045 24th
Family Furniture, 1943 Mission
Fenech Furniture, 2636 San Bruno
Franks Market, 2500 San Bruno
The Furniture Mart, 2169 Mission
Howse Hardware, 2729 Mission
K. S. TV & Radio, 5488 Mission
Lee Furniture, 2838 Mission
Mission Reliable, 2255 Mission
Patek & Co., 1900 16th Street
Payless Furniture, 2177 Mission
Pound's Refrigeration, 4407 Valencia

Sabella TV, 1631 20th Street
Sipes TV Service, 136 Church
Standard Furniture, 3124 24th Street
Stanley's Radio, 3043 16th Street
State Radio & Music, 2796 Mission
Thomsen Refrigeration, 5451 Mission
Time Home Furniture, 3201 Mission
United TV, 2838 24th Street
Wally's TV, 2345 Mission
Young Bros. TV, 2301 Mission

There are now more than forty of such stores located in said Mission District selling one or more Admiral products.

4. This affidavit is made in support of the motion of all defendants for summary judgment with respect to Count One of the complaint in the above-entitled action.

/s/ WILLIAM M. CASEY

Sworn to before me and subscribed in my presence this 10th day of July, 1956.

[Seal] /s/ FRED J. CASASSA,
Notary Public in and for the City and County of San Francisco, State of California. My Commission Expires November 18, 1956.

[Title of District Court and Cause.]

AFFIDAVIT OF WILLARD H. MIXTER IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

State of California
City and County of San Francisco—ss.

Willard H. Mixter, being first duly sworn, deposes and says:

1. I am now, and was at all times herein mentioned, an officer of defendant H. R. Basford Company. From March 1, 1952 until December 31, 1955 I was Vice-President & General Manager; from January 1, 1956 to date I have been President & General Manager.

2. H. R. Basford Company is and was at all times mentioned distributor in the City and County of San Francisco for Zenith radios and Zenith television sets manufactured by defendant Zenith Radio Corporation, and is and was engaged in selling said Zenith products to retailers located in San Francisco for resale by them to the public. I have personal knowledge of the persons, firms and corporations who are selling, or have at any time herein mentioned sold, said Zenith products at retail in San Francisco.

3. At all times since January 1, 1952 there have been a minimum of 120 stores located in San Francisco selling said Zenith products at retail, including The City of Paris, W. & J. Sloan Co., The Emporium, Sherman Clay Co., Macy's, Sterling

Furniture Co., Lachman Bros., Nathan Dohrmann Co., Schwabacher-Frey Co., Chas. Brown & Sons, and the J. C. Penney Co. On February 23, 1956 there were and there are now 153 retail stores located in San Francisco selling said Zenith products.

4. At all times since January 1, 1952 there have been a minimum of 10 stores located in the Mission District of San Francisco selling said Zenith products at retail. On February 23, 1956, there were, and there are now 10 retail stores located in said Mission District selling said Zenith products, to-wit;

Name of Store	Address
(a) Hale's	2565 Mission Street
(b) Kay Jewelry	2548 Mission Street
(c) Atlas Radio	3242 22nd Street
(d) Hervey's	2627 Mission Street
(e) Granville's	2512 Mission Street
(f) Young Bros.	2301 Mission Street
(g) Christophes	2388 Mission Street
(h) Wally's	2345 Mission Street
(i) Jack Dougal	2460 Mission Street
(j) B.G.M. Radio & TV,	2412 Mission Street

Over the period from January 1, 1952 through February 23, 1956, and up to the present time, the number of retail stores selling Zenith products in San Francisco has remained more or less constant and at no time during that period have there been less than 120 retail stores located in San Francisco selling Zenith products.

/s/ WILLARD H. MIXTER
President and General Manager H. R. Basford Co.

Subscribed and sworn to before me this 26th day of June, 1956.

[Seal] /s/ MARIE McGILLAWAY
Notary Public in and for the City and County of San Francisco, State of California. My Commission expires March 28, 1959.

[Title of District Court and Cause.]

AFFIDAVIT OF WILLARD H. MIXTER IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

State of California
City and County of San Francisco—ss.

Willard H. Mixter, being first duly sworn, deposes and says:

1. I am now, and was at all times herein mentioned, an officer of defendant H. R. Basford Company. From March 1, 1952 until December 31, 1955 I was Vice-President & General Manager; from January 1, 1956 to date I have been President & General Manager.

2. H. R. Basford Company was at all times herein mentioned and until December 31st, 1955, the distributor in the City and County of San Francisco for Whirlpool clothes-washers and dryers and was engaged in selling said Whirlpool products to retailers located in San Francisco for resale by them to the public. I have personal knowledge of

the persons, firms, and corporations who are selling, or have at any time herein mentioned until December 31st, 1955, sold said Whirlpool products at retail in San Francisco.

3. At all times from January 1, 1952 and until December 31, 1955, there have been a minimum of 40 stores located in San Francisco selling said Whirlpool products at retail, including the Emporium, Macy's, Schwabacher-Frey Co., Sterling Furniture Co., and Lachman Bros. Furniture Co. On December 31, 1955, there were 67 retail stores located in San Francisco selling said Whirlpool products.

4. At all times from January 1, 1952 through December 31, 1955, there were a minimum of five stores located in the Mission District of San Francisco selling said Whirlpool products at retail. On December 31, 1955 there were 5 retail stores located in said Mission District selling Whirlpool products, to-wit:

Name of Store		Address
(a)	Hale Bros.	2565 Mission Street
(b)	Young Bros.	2301 Mission Street
(c)	Lee Furniture	2838 Mission Street
(d)	Starlight Furniture	2211 Mission Street
(e)	J. & L. Cleary	3215 Mission Street

Over the period from January 1, 1952 until December 31, 1955 the number of retail stores selling Whirlpool products in San Francisco has remained more or less constant and at no time during that

period has there been less than 40 retail stores selling such Whirlpool products.

/s/ WILLARD H. MIXTER
President & General Manager
H. R. Basford Company

Subscribed and sworn to before me this 26th day of June, 1956.

[Seal] /s/ MARIE McGILLAWAY
Notary Public in and for the City and County of San Francisco, State of California. My Commission expires March 28, 1959.

[Title of District Court and Cause.]

AFFIDAVIT OF PARSHALL L. HENRY, SALES MANAGER OF LEO J. MEYBERG COMPANY, ON MOTION TO DISMISS

State and Northern District of California,
City and County of San Francisco—ss.

Parshall L. Henry, being first duly sworn, deposes and says:

That he is and has been, since the 6th day of July, 1954, Sales Manager of Radio and Television Department of Leo J. Meyberg Company, one of the defendants, above-named. Leo J. Meyberg Company is the distributor in Northern California of televisions and radios manufactured by Radio Corporation of America;

As such sales manager he is in charge of selecting persons, firms and corporations in the territory of Northern California and particularly in the City and County of San Francisco, who handle RCA Radios and Television for the purpose of resale to the public.

Annexed to this affidavit, marked Exhibit "A", referred to and by such reference made a part hereof, with the same force and effect as though set forth at large herein, is a correct list of dealers in the City and County of San Francisco, in radios and televisions manufactured by Radio Corporation of America;

That said list is full, true and correct as of the date hereof and with some minor variations, is correct as of the date the above-entitled action was commenced, to-wit: the 23rd day of February, 1956.

As of the date of this affidavit there are 127 dealers selling radios and televisions manufactured by Radio Corporation of America to the public in the said City and County of San Francisco. Of these 127 dealers, 18 are located in the Mission District.

At all times since January 1, 1952, there have been substantially the same number of such dealers in said City and County and said District.

In addition, at all times since January 1, 1952, there have been a substantial number of retail stores selling radios manufactured by Radio Corporation

of America to the public in said City and County and said District.

/s/ PARSHALL L. HENRY

Subscribed and sworn to before me this 14th day of July, 1956.

[Seal] /s/ JOHN G. STAMP
Notary Public in and for the City and County of San Francisco, State of California.

[Title of District Court and Cause.]

AFFIDAVIT OF SEYMOUR J. COOPER IN SUPPORT OF MOTION OF JEFFERSON-TRAVIS, INC. FOR SUMMARY JUDGMENT

State of California
City and County of San Francisco—ss.

Seymour J. Cooper, being first duly sworn, deposes and says:

1. I am now, and was at all times since November, 1954, an officer, to-wit, Vice-President, of defendant Jefferson-Travis, Inc. I was at all times between January, 1952 and November, 1954, an officer, to-wit, Vice-President (January, 1952 to July, 1952) and President (July, 1952 to November, 1954) of Emerson West Coast Corporation, a California corporation.

2. Jefferson-Travis, Inc., is, and was at all times

since November 1, 1954, the distributor in the City and County of San Francisco, hereinafter referred to as San Francisco, of radios and television sets manufactured by Emerson Radio and Phonograph Corporation, hereinafter referred to as Emerson, and is and was at all said times engaged in purchasing said Emerson products F.O.B. factory, Jersey City, New Jersey, and in selling said Emerson products to retailers located in San Francisco for resale to the public. Emerson West Coast Corporation was at all times between January, 1952 and November, 1954, the distributor in San Francisco, of radios and television sets manufactured by said Emerson, and was at all said times engaged in purchasing said Emerson products F.O.B. factory, Jersey City, New Jersey, and in selling said Emerson products to retailers located in San Francisco for resale to the public. I have personal knowledge of the persons, firms and corporations who are selling, or have at any time since May, 1952, sold said Emerson products at retail in San Francisco.

3. At all times since May, 1952, there have been a minimum of forty (40) stores located in San Francisco selling said Emerson products at retail, including at the present time such representative retail stores as I. Magnin's, City of Paris, Macy's and the White House. On February 23, 1956 there were one hundred and nine (109) retail stores located in San Francisco selling said Emerson products.

4. At all times since January 1, 1952, there have

been a minimum of thirteen (13) stores located in the Mission District of San Francisco selling said Emerson products at retail. On February 23, 1956, there were twenty-nine (29) retail stores located in said Mission District selling said Emerson products, to-wit:

	Name of Store	Address
(1)	Bayview Appliance	5015 3rd Street
(2)	Cristofani & Muzio	1375 Mission Street
(3)	Darios Home Furnishings	2660 San Bruno
(4)	Drakes Jewelers	2320 Mission Street
(5)	Eagle Sporting Goods,	123 3rd Street
(6)	Ernie Gatto	5158 3rd Street
(7)	Goodyear Service Store	1475 Mission Street
(8)	Hale Bros.	2565 Mission Street
(9)	Jamke Radio	324 Cortland
(10)	K's Television	5488 Mission Street
(11)	Kay Jewelers	2548 Mission Street
(12)	Koch Furniture	2071 Mission Street
(13)	Lachman Bros.	2019 Mission Street
(14)	Mission Reliable Furniture	2255 Mission Street
(15)	Obadashian & Sons	2180 Folsom
(16)	Pacific Appliance	2456 Mission Street
(17)	Pacific Radio & Television	2260 Mission Street
(18)	Price-Rite Television	1422 22nd Street
(19)	Schindel's Furniture	83 Leland
(20)	Sipes Television Service	136 Church Street

(21)	Standard Furniture	3124 24th Street
(22)	Starlight Furniture	2211 Mission Street
(23)	Strand Service	2000 3rd Street
(24)	Television Engineering	2704 24th Street
(25)	Tip Top Radio & Television	6295 3rd Street
(26)	Universal Furniture	1975 Mission Street
(27)	Video Service	1550 Howard Street
(28)	Waxman Furniture	2243 Mission Street
(29)	Young Bros.	2301 Mission Street

Each of the stores immediately hereinabove listed is in substantial competition with plaintiff Klor's, Inc. in the retail sale of Emerson products in the Mission District of San Francisco.

5. Since May, 1952, the number of retail stores selling said Emerson products in San Francisco has been constantly increasing. Thus, in May, 1952, there were forty (40) such stores; on January 1, 1953, sixty (60); on January 1, 1954, seventy-two (72); on January 1, 1955, one hundred and twenty (120); and on January 1, 1956, one hundred and twenty-four (124). The slight decrease in the number of retail stores selling Emerson products in San Francisco between January 1, 1956 and February 23, 1956, is the result of the fact that January and February are traditionally slow months in the sale of products similar to those manufactured by Emerson.

6. Similarly, since May, 1952, the number of retail stores selling said Emerson products in the Mission District of San Francisco has been con-

stantly increasing. Thus, in May, 1952, there were thirteen (13) such stores; on January 1, 1953, fourteen (14); on January 1, 1954, seventeen (17); on January 1, 1955, thirty-one (31); and on January 1, 1956, thirty-three (33).

/s/ SEYMOUR J. COOPER

Subscribed and sworn to before me this 6th day of July, 1956.

[Seal] /s/ VIOLET NEIERNBURG
Notary Public in and for the City and County of San Francisco, State of California. My Commission expires Jan. 4, 1959.

[Title of District Court and Cause.]

AFFIDAVIT OF VERNON S. DALLMAN IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AS TO COUNT ONE OF THE COMPLAINT

State of California
City and County of San Francisco—ss.

Vernon S. Dallman, being first duly sworn, deposes and says:

1. I am now, and was at all times herein mentioned, an officer, to-wit, President of defendant Dallman Co., sued herein as Dallman Supply Co.

2. Dallman Co. is, and was at all times herein mentioned, the distributor in the City and County

of San Francisco, of the radios, televisions and refrigerators manufactured by defendant Philco Corporation, and is and was engaged in selling said Philco Corporation products to retailers located in San Francisco for resale by them to the public. I have personal knowledge of the persons, firms and corporations who are authorized to sell or have at any time herein mentioned been authorized to sell said Philco Corporation products at retail in San Francisco.

3. At all times since January 1, 1952 there has been a minimum of seventy-nine (79) stores located in San Francisco authorized to sell said Philco Corporation products at retail. The following are some of the more prominent stores:

The White House, Sutter and Grant Streets.

Chas. Brown & Sons, 813 Market Street.

City of Paris, Geary and Stockton Streets.

Schwabacher-Frey Co., 735 Market Street.

L. R. Jackson Homewares Co., 10th Avenue and Clement Street.

Macy's Department Store, Stockton and O'Farrell Streets.

4. On February 23, 1956, the date of the filing of the complaint herein, there were and there are now one hundred seventy-five (175) retail stores located in San Francisco authorized to sell said Philco Corporation products.

5. At all times since January 1, 1952 there has been a minimum of twenty-two (22) stores located in the Mission District of San Francisco authorized

to sell said Philco Corporation products at retail. On February 23, 1956 there were, and there now are, forty-seven (47) retail stores located in said Mission District authorized to sell said Philco Corporation products, to-wit:

A-N Merchandising, 1041 Mission Street.

Alert Appliance, 3895 18th Street.

American Radio Electric Service, 4023 18th Street.

Arc Electric, 4750 Mission Street.

Associated Home Furnishers, 1370 Mission Street.

BGM Radio & Television, 2412 Mission Street.

Belview Television, 5515 Mission Street.

Bill's Radio & Television, 686 Monterey Boulevard.

Carroll's Radio & TV, 6019 Mission Street.

Cherin Furniture, 727 Valencia Street.

Cristofani & Muzio, 1375 Mission Street.

Davis Furniture Co., 981 Mission Street.

Ed's TV & Appliance, 1370 Mission Street.

Family Furniture, 1943 Mission Street.

Furniture Mart, 2169 Mission Street.

Galli Furniture Co., 1200 Valencia Street.

Griffin Furniture Co., 440 Valencia Street.

Hervey's TV, 2627 Mission Street.

Home Furniture Co., 3201 Mission Street.

Jim Koch Home Furniture, 2071 Mission Street.

L & M Television Co., 4743-A Mission Street.

Lee Furniture Co., 2838 Mission Street.

Leed's TV, 3285 21st Street.

Mission Radio & Gun Repair Co., 3361 Mission Street.

Robert Morry, Inc., 556 Mission Street.

One Dollar Radio, 2754 24th Street.

P. F. & A. Radio & TV, 240 Townsend Street.

Pacific Appliance Co., 2767 Mission Street.

Verna Ramey Co., 1375 Mission Street.

Raycliff Sewing Machine Co., 2515 Mission Street.

Robinson's Appliance Co., 803 Courtland Avenue.

Jack Rosen, Inc., 1672 Mission Street.

San Francisco Furniture Co., 839 Mission Street.

Shapiro Furniture Co., 2183 Mission Street.

Sherry & Guglielmo Furniture Co., 621 Mission Street.

Smith Radio & TV, 3245 24th Street.

Standard Furniture Co., 3124 24th Street.

Tiedeman Appliance, 3471 Mission Street.

United Furniture Co., 2154 Mission Street.

United TV Service Co., 2838 24th Street.

Universal Furniture Co., 975 Mission Street.

Universal Instrument Co., 901 South Van Ness Avenue.

Vanoni Radio Service, 3452 Mission Street.

Carl Wald Co., 268 Mission Street.

Waxman Furniture, 2243 Mission Street.

Young Bros., Inc., 2301 Mission Street.

Tony Ziro, 1041 Mission Street.

6. Since January 1, 1952 the number of retail stores authorized to sell said Philco Corporation products in San Francisco has increased. In 1952 there were one hundred thirty-five (135) such stores

and on February 23, 1956 there were and there now are one hundred seventy-five (175) such stores.

/s/ VERNON S. DALLMAN

Subscribed and sworn to before me this 9th day of July, 1956.

[Seal] /s/ HELEN L. HARTMAN
Notary Public in and for the City and County of San Francisco, State of California.

[Title of District Court and Cause.]

AFFIDAVIT OF ROBERT A. WASHBURN IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT WITH RESPECT TO COUNT ONE OF THE COMPLAINT

State of California,
City and County of San Francisco—ss.

I, Robert A. Washburn, being first duly sworn, depose and say:

I am employed by the defendant Rheem Manufacturing Company, and since on or about June 1, 1955 have been so employed, as Sales Manager of its Wedgewood Division for the northern part of California, including the City and County of San Francisco, with my office at 1355 Market Street, San Francisco, California.

Said defendant, Rheem Manufacturing Company, is and was at all times herein mentioned engaged in the business of manufacturing and selling by and

through its Wedgewood Division the ranges which are referred to in the complaint in some instances as Wedgewood gas ranges and in others as Wedgewood gas stoves. As such Sales Manager of said Wedgewood Division, I am the employee of said defendant most familiar with the facts stated in this affidavit.

Said Wedgewood gas ranges are manufactured by said defendant at its Wedgewood Division plant at Newark, Alameda County, California, and are sold directly by said Wedgewood Division to retail dealers in San Francisco and elsewhere. Said defendant has not appointed any distributors for the sale of said Wedgewood gas ranges to retail or other dealers in San Francisco and has not made and does not make any sales of said Wedgewood gas ranges to any distributors for resale by them to retail or other dealers in San Francisco, but at all times herein mentioned said defendant has made and now makes all sales of said Wedgewood gas ranges to retail dealers in San Francisco and elsewhere for resale by them to the public on a direct factory-to-dealer basis.

As such Sales Manager, I have and since on or about June 1, 1955 have had under my custody, control and supervision records of the sales made by said Wedgewood Division of said Wedgewood gas ranges to retail dealers in San Francisco, and have access to such records showing such sales made prior to on or about June 1, 1955, and I know the identity and number of said retail dealers to whom

such sales are and have been made and who are and have been engaged in selling said ranges at retail at the times herein stated.

The location of 2581 Mission Street, San Francisco, California, which is alleged in the complaint herein to be the location of the plaintiff's store, is in what is known as the Mission District in San Francisco.

At all times since January 1, 1952 there have been a minimum of forty-one stores located in San Francisco selling said Wedgewood gas ranges at retail, of which a minimum of eight have been at all of said times located in said Mission District.

On February 23, 1956 the number of such stores selling said Wedgewood gas ranges in San Francisco at retail was fifty-six, of which nine were located in said Mission District, including such stores at Gernhardt Strohmaier at 2205 Mission Street, Redlick's at 2101 Mission Street, Lachman Bros. at 16th and Mission Streets, Hale Bros. at 2565 Mission Street, Cherin's at 727 Valencia Street, Wally's Appliance & Television, at 2345 Mission Street, Shaff's Furniture Co. at 2868 Mission Street, Galli Furniture at 1200 Valencia Street, and W. G. Menary Co. at 3125 Mission Street. Since January 1, 1952 the number of such retail stores selling said Wedgewood gas ranges in San Francisco has been increasing. Thus, on January 1, 1952 there were forty-one such stores; on January 1, 1953 there were forty-five such stores; on January 1, 1954 there were fifty-two such stores; on January 1,

1955 there were fifty-two such stores; and on January 1, 1956 there were fifty-six such stores, including, in addition to said stores in said Mission District, such stores as Barker Bros. at 966 Mission Street, Dohrmann's at 281 Geary Street and 934 Mission Street, The Emporium at 835 Market Street and at Stonestown, Hale Bros. at 753 Market Street and 867 Market Street, Macy's at O'Farrell and Stockton Streets, Sterling Furniture Company at 1049 Market Street, J. H. Wiley at 2098 Market Street, House of Karlson at 130 - 10th Street, Ayoob Bros. at 2600 San Bruno Avenue, Barnal Company at 950 Geary Street, Biagis Furniture at 855 Mission Street, Brodie's at 1281 Mission Street, Burton & Rose at 745 Mission Street; California Home Furnishings at 1694 Union Street, Davis Furniture Co. at 981-85 Mission Street and 1610 Ellis Street, Figone Furniture Co. at 1652 Stockton Street, General Appliance Co. at 369 Fell Street, Ginn Wall Co. at 1016-1018 Grant Avenue, Granz & Ermann at 489 Haight Street, McManus Furniture Co. at 3259 Mission Street, Provident Furniture Co. at 4614 Mission Street, Alfredo Ratto & Sons at 561 Columbus Avenue, Vince Romeo & Son at 1300 Grant Avenue, San Francisco Furniture Co. at 839 Mission Street, The Strand Service at 18th and Mission Streets, Ti Sun Co. at 1123 Grant Avenue, Mike Yob at 1465 Haight Street, B. P. Deovlet & Sons at 1660 Pine Street, S. W. Johnson Co. at 729 Portola Drive, Geo. Peterson & Sons at 4947 Third Street, A. Ramazotti at 1473

Vallejo Street, and Thomsen's at 5451 Mission Street.

/s/ ROBERT A. WASHBURN

Subscribed and sworn to before me this 13th day of July, 1956.

[Seal] /s/ GEORGIA M. JAY,
Notary Public in and for the City and County of San Francisco, State of California.

[Title of District Court and Cause.]

AFFIDAVIT OF J. A. McGEE

State of California
City and County of San Francisco—ss.

J. A. McGee, being first duly sworn, deposes and says:

1. I am the Operating Manager of the San Francisco Branch of General Electric Supply Company, a division of General Electric Company. (Said division is hereinafter sometimes referred to as "General Electric Supply Company.") I am familiar with the records and accounts of the General Electric Supply Company.

2. The General Electric Supply Company has within the City of San Francisco the following franchised-dealers for General Electric major appliances, which include electric ranges and clothes washers and dryers:

Arc Electric Co., 4750 Mission Street, San Francisco, California.

Barnal Company, 950 Geary Street, San Francisco, California.

Bell Electric Co., 599 Castro Street, San Francisco, California.

Belview Television Co., 5515 Mission Street, San Francisco, California.

Boxer's Furn. & Appl. Co., 1401 Fillmore Street, San Francisco, California.

Butler Bros., Stonestown, San Francisco, California.

Calleja Furniture, 1667 Revere Avenue, San Francisco, California.

Cherin Furniture Co., 737 Valencia Street, San Francisco, California.

J. & L. Cleary, 3215 Mission Street, San Francisco, California.

Custom Kitchens, 165 O'Farrell Street, San Francisco, California.

B. P. Deovlet & Sons, 1660 Pine Street, San Francisco, California.

Dohrmann's, 281 Geary Blvd., San Francisco, California.

Dohrmann Commercial Co., c/o The Emporium, 835 Market Street, San Francisco, California.

Dulfer's, 103 West Portal Avenue, San Francisco, California.

Esda Sales & Service, 703 Market Street, San Francisco, California.

Ets-Hokin & Galvan, 551 Mission Street, San Francisco, California.

Fenech Furniture Co., 2636 San Bruno Avenue, San Francisco, California.

Galli Furniture, 1200 Valencia Street, San Francisco, California.

General Appliance Company, 369 Fell Street, San Francisco, California.

Gernhardt-Strohmaier Company, 2205 Mission Street, San Francisco, California.

Mario Giovanzana, 701 Union Street, San Francisco, California.

Goodyear Service Stores, 11th & Mission Streets, San Francisco, California.

Hale's Dept. Store, Radio & Appliance Store, 753 Market Street, San Francisco, California.

Hale's TV & Appliance Store, 2565 Mission Street, San Francisco, California.

Hale's TV & Appliance Store, 867 Market Street, San Francisco, California.

Hastorf-Nettles, 140 Hawthorne Street, San Francisco, California.

Household Appl. & Furn. Center, 843 Montgomery Street, San Francisco, California.

Imperial Furniture Co., 1375 Mission Street, San Francisco, California.

G. B. Jackson, 20th Avenue & Irving Street, San Francisco, California.

Kahn & Keville, Turk & Larkin Streets, San Francisco, California.

Kenney Bros. Radio, 408 Market Street, San Francisco, California.

Lachman Brothers, 16th & Mission Streets, San Francisco, California.

J. M. Long, c/o Crystal Palace Market, 1175 Market Street, San Francisco, California.

Marina Stove & Furniture Co., 2419 Lombard Street, San Francisco, California.

W. G. Menary, 3125 Mission Street, San Francisco, California.

Noriega Hdwe. & Appl., 2526 Noriega, San Francisco, California.

Ralph's Appliance & Furn., 1570 California Street, San Francisco, California.

Redlick's, 17th & Mission Streets, San Francisco, California.

K. C. Richards Co., 1734 Lombard Street, San Francisco, California.

Rodoni-Becker, 455 10th Street, San Francisco, California.

Romeo Furniture Co., 1300 Grant Avenue, San Francisco, California.

San Francisco Elec. & Hdwe., 1006 Fillmore Street, San Francisco, California.

San Francisco Furniture Co., 839 Mission Street, San Francisco, California.

Scott Plumbing Co., 243 Minna Street, San Francisco, California.

Seiki Bros., 1640 Post Street, San Francisco, California.

Shaff's Furniture Co., 2868 Mission Street, San Francisco, California.

Sterling Furniture Co., 1045 Market Street, San Francisco, California.

Stockton Furniture Co., 1210 Stockton Street, San Francisco, California.

Styles Furniture, 850 Divisadero, San Francisco, California.

Vertex Electric Co., 4334-36 Geary Blvd., San Francisco, California.

Carl Wald Co., 268 Mission Street, San Francisco, California.

Wiley Furniture Co., 2098 Market Street, San Francisco, California.

Mike Yob's Appliance, 1465 Haight Street, San Francisco, California.

Young Bros., 2301 Mission Street, San Francisco, California.

3. The General Electric Supply Company has within the Mission District of the City of San Francisco the following franchised dealers for General Electric major appliances, which include electric ranges and clothes washers and dryers:

Arc Electric Co., 4750 Mission Street, San Francisco, California.

Belview Television Co., 5515 Mission Street, San Francisco, California.

Cherin Furniture Co., 737 Valencia Street, San Francisco, California.

J. & L. Cleary, 3215 Mission Street, San Francisco, California.

Ets-Hokin & Galvan, 551 Mission Street, San Francisco, California.

Galli Furniture, 1200 Valencia Street, San Francisco, California.

Gernhardt-Strohmaier Company, 2205 Mission Street, San Francisco, California.

Goodyear Service Stores, 11th & Mission Streets, San Francisco, California.

Hale's TV & Appliance Store, 2565 Mission Street, San Francisco, California.

Imperial Furniture Co., 1375 Mission Street, San Francisco, California.

Lachman Brothers, 16th & Mission Streets, San Francisco, California.

W. G. Menary, 3125 Mission Street, San Francisco, California.

Redlick's, 17th & Mission Streets, San Francisco, California.

San Francisco Furniture Co., 839 Mission Street, San Francisco, California.

Shaff's Furniture Co., 2868 Mission Street, San Francisco, California.

Carl Wald Co., 268 Mission Street, San Francisco, California.

Wiley Furniture Co., 2098 Market Street, San Francisco, California.

Young Bros., 2301 Mission Street, San Francisco, California.

4. The General Electric Supply Company has within the City of San Francisco the following franchised dealers for General Electric television receivers:

Arc Electric Co., 4750 Mission Street, San Francisco, California.

Alexander Furniture, 39 Grove Street, San Francisco, California.

Associated Home Furniture, 1370 Mission Street, San Francisco, California.

Atlas Radio & Appliance Co., 3242 22nd Street, San Francisco, California.

BGM Radio, 2412 Mission Street, San Francisco, California.

Balboa Furn. & Appl. Co., 3729 Balboa Street, San Francisco, California.

Barnal Company, 950 Geary Street, San Francisco, California.

Frank E. Beale Co., 230 Market Street, San Francisco, California.

Bechler-Schwab, 4614 Mission Street, San Francisco, California.

Bell Electric Co., 599 Castro Street, San Francisco, California.

Biddle Radio & TV Service, 2250 Taraval, San Francisco, California.

Bories Radio & TV, 4025 Judah Street, San Francisco, California.

Boxer's Furn. & Appl. Co., 1401 Fillmore Street, San Francisco, California.

Chas. Brown & Sons, 813 Market Street, San Francisco, California.

Burton & Rose, 745 Mission Street, San Francisco, California.

Butler Bros., Stonestown, San Francisco, California.

Calleja Furniture, 1667 Revere Avenue, San Francisco, California.

J. R. Calloway & Co., 312 Mason Street, San Francisco, California.

Cherin Furniture Co., 737 Valencia Street, San Francisco, California.

Circle TV & Radio, Mr. Sam J. Bruno, 802 Greenwich Street, San Francisco, California.

City of Paris, Geary & Stockton Streets, San Francisco, California.

W. Wayne Clark, Inc., 593 Market Street, San Francisco, California.

Colberg Supplies, Attn.: Mr. H. Epstein, Sales Mgr., 777 Golden Gate Avenue, San Francisco, California.

Cristofani & Muzio, 1375 Mission Street, San Francisco, California.

Dave's Radio & Appliance, 1720 Polk Street, San Francisco, California.

Davis & Myers, 1499 Franklin Street, San Francisco, California.

B. P. Deovlet & Sons, 1660 Pine Street, San Francisco, California.

Designs Oriental, 1251 Pacific, San Francisco, California.

Dohrmann's, 281 Geary Blvd., San Francisco, California.

Dunnigan Furniture Co., 947 Columbus, San Francisco, California.

Norman Dvorson & Son, 1008 Mission Street, San Francisco, California.

The Emporium, 835 Market Street, San Francisco, California.

Ennis Furniture Co., 4134 Judah Street, San Francisco, California.

Esda Sales & Service, 703 Market Street, San Francisco, California.

Ets-Hokin & Galvan, 551 Mission Street, San Francisco, California.

Evans Radio & TV Service, 1287 Fulton Street, San Francisco, California.

Fenech Furniture Co., 2636 San Bruno Avenue, San Francisco, California.

Fidelity Trading Co., 150 California Street, San Francisco, California.

Fine Furniture, 2226 Fillmore Street, San Francisco, California.

Bud Fiske Co., 1619 Pine Street, San Francisco, California.

The Gale Company, 3407 California Street, San Francisco, California.

Galli Furniture, 1200 Valencia Street, San Francisco, California.

Geary Radio & Appliance, 5629 Geary Blvd., San Francisco, California.

General Appliance Company, 369 Fell Street, San Francisco, California.

Mario Giovanzana, 701 Union Street, San Francisco, California.

Goodyear Service Stores, 11th & Mission Streets, San Francisco, California.

Hale's Dept. Store, Radio & Appliance Store, 753 Market Street, San Francisco, California.

Hale's TV & Appliance, 867 Market Street, San Francisco, California.

Harmony Radio & Electric, 661 Clement Street, San Francisco, California.

Henshaw Home Appliances, 433 Turk Street, San Francisco, California.

Hervey's Television, 2627 Mission Street, San Francisco, California.

Household Appl. & Furn. Center, 843 Montgomery Street, San Francisco, California.

House of Karlson, 130 10th Street, San Francisco, California.

Imperial Furniture Co., 1375 Mission Street, San Francisco, California.

N. P. Kafaury, c/o Bookbinder Bros. Appl. Div., 1420 Irving Street, San Francisco, California.

Kahn & Keville, Turk & Larkin Streets, San Francisco, California.

Kenney Bros. Radio, 408 Market Street, San Francisco, California.

Paul Koss Supply Co., 900 Folsom Street, San Francisco, California.

Lachman Brothers, 16th & Mission Streets, San Francisco, California.

Alvin Lang Co., 126 Post Street, San Francisco, California.

The Lee Co., 900 Battery Street, San Francisco, California.

Lesser's, 54 Belden Street, San Francisco, California.

Lewis, Inc., 133 Kearny Street, San Francisco, California.

J. M. Long, c/o Crystal Palace Market, 1175 Market Street, San Francisco, California.

Lynch Electric, 937 McAllister Street, San Francisco, California.

Macy's-San Francisco, Stockton & O'Farrell Streets, San Francisco, California.

Marina Stove & Furniture Co., 2419 Lombard Street, San Francisco, California.

Mee Shing Radio Co., 1051 Grant Avenue, San Francisco, California.

W. G. Menary, 3125 Mission Street, San Francisco, California.

H. R. Miller & Co., 3028 San Bruno Avenue, San Francisco, California.

Mark Morris Tire Co., 999 Geary Street, San Francisco, California.

Noriega Hdwe. & Appl., 2526 Noriega, San Francisco, California.

Norton's Radio & TV, 337 Holloway Avenue, San Francisco, California.

Opp's Radio & TV Co., 3739 Balboa, San Francisco, California.

Pallas Bros. TV, 5000 Mission Street, San Francisco, California.

Phillipine Service Co., 85 5th Street, San Francisco, California.

Photo & Sound, 116 Natoma Street, San Francisco, California.

Ralph's Appliance & Furn., 1570 California Street, San Francisco, California.

Redlick's, 17th & Mission Streets, San Francisco, California.

K. C. Richards Co., 1734 Lombard St., San Francisco, California.

Barry W. Rogers Co., Inc., 121 Market Street, San Francisco, California.

Romeo Furniture Co., 1300 Grant Avenue, San Francisco, California.

Saltzman Bros., 719 Mission Street, San Francisco, California.

Lewis Samuels & Co., 520 McAllister Street, San Francisco, California.

Santos & Co., 515 Market Street, San Francisco, California.

Schwabacher-Frey Co., 735 Market Street, San Francisco, California.

Seiki Bros., 1640 Post Street, San Francisco, California.

Sherman-Clay & Co., Sutter & Kearny Streets, San Francisco, California.

Sherman-Clay & Co., 2539 Mission Street, San Francisco, California.

Sherry & Guglielmo, 621 Mission Street, San Francisco, California.

Jim Shum Supply Co., 545 Kearny Street, San Francisco, California.

Sincere TV, 1378 Pacific, San Francisco, California.

Skinner, Hirsch & Kaye, 239 Grant Avenue, San Francisco, California.

Stanley's Radio & Television Service, 3043 16th Street, San Francisco, California.

Sterling Furniture Co., 1045 Market Street, San Francisco, California.

Stockton Furniture Co., 1210 Stockton Street, San Francisco, California.

The Strand Service, 2000 3rd Street, San Francisco, California.

Styles Furniture, 850 Divisadero, San Francisco, California.

Sugarman Appliance Service, 21 Cragmont Avenue, San Francisco, California.

Super Radio Service, 3719 Mission Street, San Francisco, California.

T. J. Furniture, 701 Schrader Street, San Francisco, California.

Television of San Francisco, 659 Geary Street, San Francisco, California.

United Purchasing Agency, 386 Geary Street, San Francisco, California.

United TV & Service, 2838 24th Street, San Francisco, California.

Vertex Electric Co., 4334-36 Geary Blvd., San Francisco, California.

Carl Wald Co., 268 Mission Street, San Francisco, California.

Mason Wenzel, 255 California Street, San Francisco, California.

Wiley Furniture Co., 2098 Market Street, San Francisco, California.

World Wide Trading, 210 California Street, San Francisco, California.

Young Bros., 2301 Mission Street, San Francisco, California.

5. The General Electric Supply Company has within the Mission District of the City of San

Francisco the following franchised dealers for General Electric television receivers:

Arc Electric Co., 4750 Mission Street, San Francisco, California.

Associated Home Furniture, 1370 Mission Street, San Francisco, California.

BGM Radio, 2412 Mission Street, San Francisco, California.

Bechler-Schwab, 4614 Mission Street, San Francisco, California.

Burton & Rose, 745 Mission Street, San Francisco, California.

Cherin Furniture Co., 737 Valencia Street, San Francisco, California.

Cristofani & Muzio, 1375 Mission Street, San Francisco, California.

Norman Dvorson & Son, 1008 Mission Street, San Francisco, California.

Ets-Hokin & Galvan, 551 Mission Street, San Francisco, California.

Galli Furniture, 1200 Valencia Street, San Francisco, California.

Goodyear Service Stores, 11th & Mission Streets, San Francisco, California.

Hervey's Television, 2627 Mission Street, San Francisco, California.

Imperial Furniture Co., 1375 Mission Street, San Francisco, California.

Lachman Brothers, 16th & Mission Streets, San Francisco, California.

W. G. Menary, 3125 Mission Street, San Francisco, California.

Pallas Bros. T.V., 5000 Mission Street, San Francisco, California.

Redlick's, 17th & Mission Streets, San Francisco, California.

Saltzman Bros., 719 Mission Street, San Francisco, California.

Sherman-Clay & Co., 2539 Mission Street, San Francisco, California.

Sherry & Guglielmo, 621 Mission Street, San Francisco, California.

Sterling Furniture Co., 1045 Market Street, San Francisco, California.

Super Radio Service, 3719 Mission Street, San Francisco, California.

Carl Wald Co., 268 Mission Street, San Francisco, California.

Wiley Furniture Co., 2098 Market Street, San Francisco, California.

Young Bros., 2301 Mission Street, San Francisco, California.

6. The following retailers in San Francisco are on the books of the General Electric Supply Company as traffic appliance and radio dealers:

A. & B. Electric & Radio, 741 Jackson Street, San Francisco, California.

A-K Radio, 3804 17th Street, San Francisco, California.

A. & M. Merchandising, 1041 Mission Street, San Francisco, California.

Ace Radio Co., 2267 Market Street, San Francisco, California.

H. Acosta's Jewelry, 551 Haight Street, San Francisco, California.

Adam-Hill Co., 244 9th Street, San Francisco, California.

Alexander Furniture, 39 Grove Street, San Francisco, California.

American Appliance & Supply, 1150 Sutter Street, San Francisco, California.

American & Far Eastern Trading, 24 California Street, San Francisco, California.

Apartment Supply Company, 554 Mission Street, San Francisco, California.

Appliance Mart, 448 Larkin Street, San Francisco, California.

Applebaum Sales, 1288 Golden Gate, San Francisco, California.

Arc Electric Co., 4750 Mission Street, San Francisco, California.

Army Air Force Exchange Service, Mr. Clyde Dunham, 563 Market Street, San Francisco, California.

Arteo, 600 Van Ness, San Francisco, California.

Associated Home Furniture, 1370 Mission Street, San Francisco, California.

Atlas Paper, 740 Folsom Street, San Francisco, California.

Atlas Radio & Appliance Co., 3242 22nd Street, San Francisco, California.

Automatic Home Laundry, 60 Clara Street, San Francisco, California.

Axelrad Furniture Co., 1102 Sutter Street, San Francisco, California.

Ayoob Bros., 2600 San Bruno Avenue, San Francisco, California.

Azevedo Bros., 210 Post Street, San Francisco, California.

BGM Radio, 2412 Mission Street, San Francisco, California.

Ben C. Baglion, 319 8th Avenue, San Francisco, California.

Edward Baker Co., 330 Market Street, San Francisco, California.

Balboa Furn. & Appl. Co., 3729 Balboa Street, San Francisco, California.

Barnal Company, 950 Geary Street, San Francisco, California.

Alfred Bass, 585 Market Street, San Francisco, California.

Bay Area Exchange, Mr. S. Karlan, Presidio of San Francisco, San Francisco, California.

Bay View Pharmacy, 6157 Geary Blvd., San Francisco, California.

Paul Bayer, 617 Clement Street, San Francisco, California.

Frank E. Beale Co., 230 Market Street, San Francisco, California.

Bear Photo Service, 330 Grove Street, San Francisco, California.

Bechler & Schwab Furn. Co., 4614 Mission Street, San Francisco, California.

Beier & Gunderson, 77 Battery Street, San Francisco, California.

Bell Electric Co., 599 Castro Street, San Francisco, California.

Monroe J. Belling, 1126 Market Street, San Francisco, California.

Belview Appliance, 5515 Mission Street, San Francisco, California.

L. Benthen Jewelry Co., 2050 Fillmore Street, San Francisco, California.

Best Quality Radio Store, 285 Eddy Street, San Francisco, California.

Better Homes Furniture Co., 2226 Polk Street, San Francisco, California.

Biaggi's Furniture, 855 Mission Street, San Francisco, California.

Biddle Radio & TV Service, 2250 Taraval, San Francisco, California.

Borelli Hdwe. & Sptg. Goods Co., 4537 Mission Street, San Francisco, California.

Bories Radio & TV, 4025 Judah Street, San Francisco, California.

J. M. Boscus Co., 339 Clement Street, San Francisco, California.

Bowerman's Pharmacy, 356 Post Street, San Francisco, California.

Bowerman's Lakeside Pharmacy, Ocean Ave. and Junipera Serra, San Francisco, California.

C. A. Bowman, 2415 Sutter Street, San Francisco, California.

Boxer's Furn. & Appl. Co., 1401 Fillmore Street, San Francisco, California.

Broemmel's Pharmacy, 384 Post Street, San Francisco, California.

Henry Brilliant, Jewelers, 2351 Mission Street, San Francisco, California.

Brown Furniture & Appl., 2275 Market Street, San Francisco, California.

Chas. Brown & Sons, 813 Market Street, San Francisco, California.

Chas. Brown Hotel Supply, 712 Market Street, San Francisco, California.

Bunny Hardware, 2613 Mission Street, San Francisco, California.

Burton & Rose, 745 Mission Street, San Francisco, California.

Al Bush Electric, 1245 Folson Street, San Francisco, California.

Butler Bros., Stonestown, San Francisco, California.

Byington Electric Co., 1809 Fillmore Street, San Francisco, California.

California Furnishers, 2949 Balboa, San Francisco, California.

California Home Furnishings, 1694 Union, San Francisco, California.

Calleja Furniture, 1667 Revere Avenue, San Francisco, California.

J. R. Calloway & Co., 312 Mason Street, San Francisco, California.

Camera Center, 1080 Market Street, San Francisco, California.

Carlotta's Toy Shop, 17 West Portal Avenue, San Francisco, California.

A. Cavalli & Co., 1441 Stockton Street, San Francisco, California.

Central Appliance, 2967 Mission Street, San Francisco, California.

M. L. Chaban, 50 Main Street, San Francisco, California.

Cherin Furniture Co., 737 Valencia Street, San Francisco, California.

Christian of Copenhagen, Inc., 225 Post Street, San Francisco, California.

Christophe's, 2388 Mission Street, San Francisco, California.

Church Purchasing & Service Agcy., 417 Market Street, San Francisco, California.

Cincotti Bros., 169 Jefferson Street, San Francisco, California.

Circle TV & Radio, Mr. Sam J. Bruno, 802 Greenwich Street, San Francisco, California.

City of Paris, Geary & Stockton Streets, San Francisco, California.

Clarks Furniture, 1625 Mission Street, San Francisco, California.

W. Wayne Clark, Inc., 593 Market Street, San Francisco, California.

J. & L. Cleary, 3215 Mission Street, San Francisco, California.

Cliff's Variety, 515 Castro Street, San Francisco, California.

Colberg Supplies, Attn.: Mr. H. Epstein, Sales Mgr., 777 Golden Gate Avenue, San Francisco, California.

Cole Street Hardware Co., 944 Cole Street, San Francisco, California.

Columbia Music & Electronic Co., 1080 Market Street, San Francisco, California.

Columbus Furniture Co., 950 Columbus Avenue, San Francisco, California.

Commercial Trading Co., 24 California Street, San Francisco, California.

Ted Cooper's Hardware, 5221 Geary Blvd., San Francisco, California.

Coronet Sales, 390 Eddy Street, San Francisco, California.

Cowan Associates, 241 Clay Street, San Francisco, California.

Cristofani & Muzio, 1375 Mission Street, San Francisco, California.

Crocker-Johnson, 733 Harrison Street, San Francisco, California.

Custom Kitchens, 165 O'Farrell Street, San Francisco, California.

Dale Company, 614 Jackson Street, San Francisco, California.

Dalziel Plumbing Supplies, 2741 16th Street, San Francisco, California.

Dario Furniture Co., 2660 San Bruno Avenue, San Francisco, California.

Dart Appliance Stores, 1318 Polk Street, San Francisco, California.

Dave's Radio & Appliance, 1720 Polk Street, San Francisco, California.

Davis Furniture, 981 Mission Street, San Francisco, California.

Davis & Myers, 1499 Franklin Street, San Francisco, California.

B. P. Deoylet & Sons, 1660 Pine Street, San Francisco, California.

Designs Oriental, 1251 Pacific, San Francisco, California.

The Diamond Palace, 797 Market Street, San Francisco, California.

Dimmer Hardware Co., 1715 Polk Street, San Francisco, California.

J. L. Dirickx, 149 California Street, San Francisco, California.

Dohrmann's, 281 Geary Street, San Francisco, California.

Jack Dougal's Jewelry, 2460 Mission Street, San Francisco, California.

Dowd-Seid Electric, 2118 Mission Street, San Francisco, California.

Doyle Furniture Co., 821 Mission Street, San Francisco, California.

Duart Mfg. Ltd., 984 Folsom Street, San Francisco, California.

Dulfer's, 103 West Portal Avenue, San Francisco, California.

Dunham & Smith Agencies, Inc., 25 California Street, San Francisco, California.

Dunnigan Furniture Co., 947 Columbus, San Francisco, California.

Norman Dvorson & Son, 1008 Mission Street, San Francisco, California.

East Asiatic Co., 465 California Street, San Francisco, California.

Easterday Supply Co., Fell & Gough Streets, San Francisco, California.

Electrical Appliance Service, 1434 Howard Street, San Francisco, California.

Electrolux Corporation, 417 Montgomery Street, San Francisco, California.

Embassy Jewelers, Inc., 126 Post Street, San Francisco, California.

The Emporium, 835 Market Street, San Francisco, California.

Ennis Furniture Co., 4134 Judah Street, San Francisco, California.

Ernie's, 336 4th Street, San Francisco, California.

Ernie Gatto Radio & TV, 5158 3rd Street, San Francisco, California.

Esda Sales & Service, 703 Market Street, San Francisco, California.

Ets-Hokin & Galvan, 551 Mission Street, San Francisco, California.

Evans Radio & TV Service, 1287 Fulton Street, San Francisco, California.

Excelsior Camera Shop, 4661 Mission Street, San Francisco, California.

F. & R. Enterprises, 968 Valencia Street, San Francisco, California.

Family Furniture, 1943 Mission Street, San Francisco, California.

Fashion Furniture, 2100 Taraval, San Francisco, California.

Fedeli Electric Co., 1766 Mission Street, San Francisco, California.

Federal Store, c/o The Majestic, 916 Howard Street, San Francisco, California.

Federal Stores, 725 Market Street, San Francisco, California.

Fenech Furniture Co., 2636 San Bruno Avenue, San Francisco, California.

Ferrera Bros. Hardware, 4540 Mission Street, San Francisco, California.

Ferrera Variety & Hdwe. Store, 4653 Mission Street, San Francisco, California.

Fidelity Trading Co., 150 California Street, San Francisco, California.

Figone Furniture Co., 1652 Stockton Street, San Francisco, California.

Fillmore Camera Shop, 1229 Fillmore Street, San Francisco, California.

Fine Furniture, 2226 Fillmore Street, San Francisco, California.

Bud Fiske Co., 1619 Pine Street, San Francisco, California.

Forest Hill Pharmacy, 400 Dewey Blvd., San Francisco, California.

Frank's Jewelers, 1079 Market Street, San Francisco, California.

Fredericksen Hardware, 3029 Fillmore Street, San Francisco, California.

Freedman's Radio, 280 Golden Gate, San Francisco, California.

J. E. French Co., 1849 Van Ness Avenue, San Francisco, California.

E. Friedlander, 3747 Sacramento Street, San Francisco, California.

Friendly Furniture, 547 Clement, San Francisco, California.

The Gale Company, 3407 California Street, San Francisco, California.

Galli Furniture, 1200 Valencia Street, San Francisco, California.

M. B. Gardner, 199 Geary Street, San Francisco, California.

Geary Radio & Appliance, 5629 Geary Blvd., San Francisco, California.

General Appliance Company, 369 Fell Street, San Francisco, California.

General Export, 74 Sacramento Street, San Francisco, California.

General Refrigerator Sales Co., 353 Sutter Street, San Francisco, California.

General Sales Corp., 745 Bryant Street, San Francisco, California.

Gernhardt-Strohmaier Company, 2205 Mission Street, San Francisco, California.

E. A. Giacobbi Co., 133 Geary Street, San Francisco, California.

Gilbert Electric, 465 O'Farrell Street, San Francisco, California.

Ginn Wall Co., 1016 Grant Avenue, San Francisco, California.

Mario Giovanzana, 701 Union Street, San Francisco, California.

Glen Five & Ten, 3914 Judah Street, San Francisco, California.

Golden Gate TV & Appl. Co., 701 Golden Gate Avenue, San Francisco, California.

Golden Star Radio, 846 Clay Street, San Francisco, California.

Golden State Company, Ltd., 425 Battery Street, San Francisco, California.

Goodyear Service Stores, 11th & Mission Streets, San Francisco, California.

Charles Gottfried Co., 619 Mission Street, San Francisco, California.

Granat Bros., 2390 Mission Street, San Francisco, California.

Granville's, Geary & Kearny Streets, San Francisco, California.

Granville's-Fillmore, Inc., 1642 Fillmore Street, San Francisco, California.

Granz & Ermann, 489 Haight Street, San Francisco, California.

Wm. P. Gross, 4640 Geary Blvd., San Francisco, California.

Gumps, 250 Post Street, San Francisco, California.

Hale's Dept. Store, Radio & Appliance Store, 753 Market Street, San Francisco, California.

Hale's TV & Appliance Store, 2565 Mission Street, San Francisco, California.

Hale's TV & Appliance Store, 867 Market Street, San Francisco, California.

Haluk Lighting & Mfg., 30 Elmira Street, San Francisco, California.

Hamburger Siegfried Co., 111 New Montgomery Street, San Francisco, California.

Harmony Radio & Electric, 661 Clement Street, San Francisco, California.

Hartman Jewelry Company, 126 Post Street, San Francisco, California.

Heines Hardware, 3614 Balboa Street, San Francisco, California.

Henshaw Home Appliances, 433 Turk Street, San Francisco, California.

Hersh's Dept. Store, 1155 Market Street, San Francisco, California.

Hervey's Television, 2627 Mission Street, San Francisco, California.

The Hobby Center, 5748 Geary Blvd., San Francisco, California.

Florence Huber, Interiors, 2095 Union Street, San Francisco, California.

Hockwald Chemical Co., 135 Mississippi Street, San Francisco, California.

Hughes & Byrd, 185 Post Street, San Francisco, California.

Hundert Appliance Co., 1058 Folsom Street, San Francisco, California.

Home Appliance, 816 Irving Street, San Francisco, California.

Home Furniture Co., 3201 Mission Street, San Francisco, California.

Honnami Taieido, 1709 Buchanan Street, San Francisco, California.

House of Furniture, 2000 Union Street, San Francisco, California.

House of Karlson, 130-10th Street, San Francisco, California.

Household Appl. & Furn. Center, 843 Montgomery Street, San Francisco, California.

Imperial Furniture Co., 1375 Mission Street, San Francisco, California.

Inglewood Store, 2379 Ocean Avenue, San Francisco, California.

G. B. Jackson, 20th Avenue & Irving Street, San Francisco, California.

L. R. Jackson, 852 Clement Street, San Francisco, California.

Jamke Radio Sales, 324 Cortland Avenue, San Francisco, California.

The Jays, 801 Arguello Blvd., San Francisco, California.

Jeffress Hdwe. & Paint Co., 2351 Market Street, San Francisco, California.

Jenkel Jewelers, 126 Post Street, San Francisco, California.

Al John Furniture & Appl., 1313 Mason Street, San Francisco, California.

Jordon International Co., 444 Market Street, San Francisco, California.

N. P. Kafaury, c/o Bookbinder Bros. Appl Div., 1420 Irving Street, San Francisco, California.

Kahn & Keville, Turk & Larkin Streets, San Francisco, California.

Kay Furniture Co., 1516 Fillmore Street, San Francisco, California.

Kay Jewelry Co., 2548 Mission Street, San Francisco, California.

R. P. Kearns Co., 165 Post Street, San Francisco, California.

H. Clayton Keller Furniture Co., 2877 California Street, San Francisco, California.

Kenney Bros. Radio, 408 Market Street, San Francisco, California.

Keystone Products Co., 153 Kearny Street, San Francisco, California.

Kindall & Graham, 782 Mission Street, San Francisco, California.

Jim Kock Home Furnishings, 2071 Mission St., San Francisco, California.

Komor's, 3315 Irving Street, San Francisco, California.

Paul Koss Supply Co., 900 Folsom Street, San Francisco, California.

Knapp Radio & Appliance, 1033 Irving Street, San Francisco, California.

S. H. Kress & Co., 939 Market Street, Hdwe. Div., San Francisco, California.

S. H. Kress & Co., 2712 Mission Street, Store 873, San Francisco, California.

Lachman Brothers, 16th & Mission Streets, San Francisco, California.

Lam Electrical Repairs, 803 Broadway, San Francisco, California.

Lambert Furniture Co., 4037 Balboa Street, San Francisco, California.

Alvin Lang Co., 126 Post Street, San Francisco, California.

La Scala Radio, 1436 California Street, San Francisco, California.

The Lee Company, 900 Battery Street, San Francisco, California.

Lee Furniture Co., 2838 Mission Street, San Francisco, California.

Lenore Linen, 316 Post Street, San Francisco, California.

Marcus Lesoine, 1625 Bush Street, San Francisco, California.

Lesser's, 54 Belden Street, San Francisco, California.

R. Levitin Furn. & Appliance, 1014 Clement Street, San Francisco, California.

Lewis Inc., 133 Kearny Street, San Francisco, California.

Lindeburg & Co., 175 Ellis Street, San Francisco, California.

Little City Houseware, 1341 Stockton Street, San Francisco, California.

Little Food Shop, 535 Scott Street, San Francisco, California.

J. M. Long, c/o Crystal Palace Market, 1175 Market Street, San Francisco, California.

Lynch Electric, 937 McAllister Street, San Francisco, California.

Lyon Agency, 293 - 8th Street, San Francisco, California.

M & S Cigar Store, 220 Bush Street, San Francisco, California.

Mac's Radio & TV, 915 Cole Street, San Francisco, California.

Macy's-San Francisco, Stockton & O'Farrell Streets, San Francisco, California.

Mahoney Electric, 1375 Valencia Street, San Francisco, California.

Majestic Store, 2474 Mission Street, San Francisco, California.

Malita Furniture, 2660 San Bruno Avenue, San Francisco, California.

C. A. Malm & Co., 230 Post Street, San Francisco, California.

Manor Hardware Co., 2601 Ocean Avenue, San Francisco, California.

Marina Stove & Furniture Co., 2419 Lombard Street, San Francisco, California.

Marine Corps Area Exchange, 100 Harrison Street, San Francisco, California.

Market Hardware, 147 Jackson Street, San Francisco, California.

Market Radio, 1240 Market Street, c/o Sound Dept., San Francisco, California.

Marsh Hdwe. & Variety Store, 498 Taraval Street, San Francisco, California.

Marshall's West Portal Pharmacy, 186 West Portal, San Francisco, California.

Walter Mayer Refrigeration Supply, 1397 Valencia Street, San Francisco, California.

McLab Company, 11 Lakeshore Plaza, San Francisco, California.

McKesson-Robbins, 50 First Street, San Francisco, California.

McRosky-Airflex Mattress, 1687 Market Street, San Francisco, California.

McWilliams Radio & TV Service, 3040 Taraval Street, San Francisco, California.

Mee Shing Radio Co., 1051 Grant Avenue, San Francisco, California.

W. G. Menary, 3125 Mission Street, San Francisco, California.

Merrills Drug Center, 805 Market Street, San Francisco, California.

Merrill's Drug Store, 1091 Market Street, San Francisco, California.

Meyers Self Serv. Stores, 4049 - 24th Street, San Francisco, California.

Midtown Furniture Co., 1330 Polk, San Francisco, California.

Military Sea Transport Service Welfare & Recreation Fund., Pac. Area, Whse. C., Bldg. 314, Fort Mason, San Francisco. Mr. D. W. Blossom, Cmdr. E. B. Terrio.

H. R. Miller & Co., 3028 San Bruno Avenue, San Francisco, California.

J. V. Moan Commissary Co., 45 Hubbell, San Francisco, California.

Modern Appliance Company, 2311 Market Street, San Francisco, California.

Modern House, 3265 - 16th Street, San Francisco, California.

Modern Radio Co., 1475 Haight Street, San Francisco, California.

Model Radio & Electric Shop, 220 Taraval Street, San Francisco, California.

Modern TV & Appliance Co., 2114 Fillmore Street, San Francisco, California.

Mohr Radio, 2298 Fillmore Street, San Francisco, California.

Molkenbuhr Bros., 23 Grant Avenue, San Francisco, California.

Morgan & Barclay Company, 531 Mission Street, San Francisco, California.

Peter Mork Jewelry, 225 West Portal Avenue, San Francisco, California.

Mark Morris Tire Co., 999 Geary Street, San Francisco, California.

Moulin Studio, 181 Second Street, San Francisco, California.

Mowwo & Dere Co., 853 Grant Avenue, San Francisco, California.

Murphy's Radio, 1508 Polk Street, San Francisco, California.

Mutschler Kitchens, 635 Texas Street, San Francisco, California.

Myron's Jewelers, 905 Stockton Street, San Francisco, California.

The National Dollar Stores, 929 Market Street, San Francisco, California.

National Theater Supply, 255 Golden Gate Avenue, San Francisco, California.

Nelson's, 1181 Market Street, c/o Crystal Palace Market, San Francisco, California.

Neon Pharmacy, 2901 Van Ness Avenue, San Francisco, California.

Geo. V. Nichols, 2647 - 24th Street, San Francisco, California.

Niderost & Taber, 126 Post Street, San Francisco, California.

Niederholzer Jewelers, 133 Geary Street, San Francisco, California.

Nob Hill Market, 1001 Powell Street, San Francisco, California.

Nob Hill Sales & Service, 1148 Taylor Street, San Francisco, California.

Noriega Furniture Co., 2326 Taraval Street, San Francisco, California.

Noriega Hdwe. & Appl., 2526 Noriega Street, San Francisco, California.

Norman's Kingdom of Toys, 645 Clement Street, San Francisco, California.

The Normlee Company, 576 Sacramento Street, San Francisco, California.

Norton's Radio & TV, 337 Holloway Avenue, San Francisco, California.

Oceanic Trading Co., 596 Clay Street, San Francisco, California.

Offenbach & Reimus Co., 1564 Market Street, San Francisco, California.

John A. Ofsenek, c/o H. S. Crocker Co., 260 Montgomery Street, San Francisco, California.

Olson Jewelers, 2471 Mission Street, San Francisco, California.

Olympic Supply Co., 76 Jackson Street, San Francisco, California.

On & On Drug, 919 Grant Avenue, San Francisco, California.

Opp's Radio & TV Co., 3739 Balboa, San Francisco, California.

Overseas Service Corp., 444 Market Street, San Francisco, California.

Owl Drug Store No. 5038, Mason & Market Streets, San Francisco, California.

Pacific Appliance Co., 2767 Mission Street, San Francisco, California.

Pacific Coast Stores, 167 Hilltop Road, San Francisco, California.

Pacific Hardware, 520 Haight Street, San Francisco, California.

Pacific Radio-Television Co., 2260 Mission Street, San Francisco, California.

Pallas Bros. TV, 5000 Mission Street, San Francisco, California.

Paragon Pharmacy, 398 Ellis Street, San Francisco, California.

Park Electric Co., 1535 Haight Street, San Francisco, California.

Park-Presidio Radio, 431 Clement Street, San Francisco, California.

Neel D. Parker, 1431 Van Ness Avenue, San Francisco, California.

Paul & Ford, 112 Market Street, San Francisco, California.

Peerless Radio Co., 3721 Geary Blvd., San Francisco, California.

J. C. Penney Co., 5th & Market Streets, San Francisco, California.

Phillipine Service Co., 85 - 5th Street, San Francisco, California.

Photo & Sound, 116 Natoma Street, San Francisco, California.

F. K. Pinney, Inc., 636 Clay Street, San Francisco, California.

Pioneer Radio & Electric, 1707 Buchanan Street, San Francisco, California.

Pioneer Woolen Mill, 7 Front Street, San Francisco, California.

Portigol's, 1000 Clement Street, San Francisco, California.

Powell Market, 660 Powell Street, San Francisco, California.

Progress Homewares, 724 Irving Street, San Francisco, California.

Prompt Radio & TV Co., 31 Lakeshore Plaza, San Francisco, California.

Purcell Bros., 1300 Polk Street, San Francisco, California.

Pyramid Sound Laboratories, 1201 Sutter Street, San Francisco, California.

Ralph's Appliance & Furn., 1570 California Street, San Francisco, California.

A. Ratto, 561 Columbus Avenue, San Francisco, California.

Ratto Hardware, 2132 Chestnut Street, San Francisco, California.

Record Hardware Co., 659 Columbus Avenue, San Francisco, California.

Redlick's, 17th & Mission Streets, San Francisco, California.

Reflex Furniture & Appl., 1695 Market Street, San Francisco, California.

Refrigerating & Power Spec. Co., 380 Brannan Street, San Francisco, California.

Regal Jewelers, 619 Irving Street, San Francisco, California.

Reinert & Riley, 1883 Fillmore Street, San Francisco, California.

K. C. Richards Co., 1734 Lombard Street, San Francisco, California.

Richmond Furniture Co., 933 Clement Street, San Francisco, California.

Richmond Radio, 6140 Geary Blvd., San Francisco, California.

Rite Spot Market, 1025 Taraval Street, San Francisco, California.

Robert's Hardware, 1687 Haight Street, San Francisco, California.

Rocklin's, 807 Market Street, San Francisco, California.

Barry W. Rogers Co., Inc., 121 Market Street, San Francisco, California.

Romeo Furniture Co., 1300 Grant Avenue, San Francisco, California.

Ronnie's Camera Shop, 115 West Portal, San Francisco, California.

Stanley Rosenthal, 283 Ellis Street, San Francisco, California.

George Anthony Ross, 1375 Mission Street, San Francisco, California.

Rossi Drug Co., 1600 Stockton Street, San Francisco, California.

Royal Supply Co., 425 Hayes Street, San Francisco, California.

Russ Bldg. Jewelers, 235 Montgomery Street, San Francisco, California.

S & M Radio, 1575 Fulton Street, San Francisco, California.

Safeway Stores, 2020 Market Street, San Francisco, California.

Sage, Inc., 1583 Howard Street, San Francisco, California.

Sales Associates, 780 Harrison Street, San Francisco, California.

Saltzman Bros., 719 Mission Street, San Francisco, California.

Sampson & Masters, 209 Post Street, San Francisco, California.

Albert S. Samuels Co., Jewelers, 856 Market Street, San Francisco, California.

Lewis Samuels & Co., 520 McAllister Street, San Francisco, California.

San Francisco Elec. & Hdwe., 1006 Fillmore Street, San Francisco, California.

San Francisco Furniture Co., 839 Mission Street, San Francisco, California.

San Francisco Radio, 1284 Market Street, San Francisco, California.

Santa Maria Market, 399 Evergreen Avenue, San Francisco, California.

Santos & Co., 515 Market Street, San Francisco, California.

Saul's Radio & TV, 1193 McAllister Street, San Francisco, California.

Schilling Hardware, 806 Irving Street, San Francisco, California.

Schwabacher-Frey Co., 735 Market Street, San Francisco, California.

Seaborne Trading Company, 21 Columbus Street, San Francisco, California.

Seaport Market, 2650 Clement Street, San Francisco, California.

Segale & Demartini, 454 Columbus Avenue, San Francisco, California.

Seiki Bros., 1640 Post Street, San Francisco, California.

Sewing Machine Exchange, 1131 Mission Street, San Francisco, California.

Shaff's Furniture Co., 2868 Mission Street, San Francisco, California.

Shasta Hardware & Supply Co., 50-9th Street, San Francisco, California.

B. F. Shearer Co. of California, 243 Golden Gate Avenue, San Francisco, California.

Sherman-Clay & Co., Sutter & Kearny Streets, San Francisco, California.

Sherman-Clay & Co., 2539 Mission Street, San Francisco, California.

Sherry & Co., 5131-3rd Street, San Francisco, California.

Sherry & Guglielmo, 621 Mission Street, San Francisco, California.

Shirar Young, 1450 Van Ness Avenue, San Francisco, California.

Jim Shum Supply Co., 545 Kearny Street, San Francisco, California.

Sincere TV, 1378 Pacific, San Francisco, California.

Skinner, Hirsch & Kaye, 239 Grant Avenue, San Francisco, California.

W. & J. Sloane, 224 Sutter Street, San Francisco, California.

George Smith Surgical Co., 3250 Geary Street, San Francisco, California.

Sohl's, 1615 Haight Street, San Francisco, California.

Soko Hardware, 1698 Post Street, San Francisco, California.

Specialized Service, 149 Turk Street, San Francisco, California.

Standard Furniture, 3124-24th Street, San Francisco, California.

Standard Maintenance, 6245 Geary Blvd., San Francisco, California.

Stanley's Hardware & Paint Co., 2469 San Bruno Avenue, San Francisco, California.

Stanley's Radio & Telev. Service, 3043 - 16th Street, San Francisco, California.

Star Pharmacy, 18th & Castro Streets, San Francisco, California.

Starlite Radio, 2477 Sacramento Street, San Francisco, California.

State Furniture Co., 879 Mission Street, San Francisco, California.

State Radio & Music Co., 2796 Mission Street, San Francisco, California.

E. Stein & Co., 1375 Mission Street, San Francisco, California.

Steinberg Electric, 1344 Fillmore Street, San Francisco, California.

Sterling Furniture Co., 1045 Market Street, San Francisco, California.

Stiavelli Jewelers, 210 Post Street, San Francisco, California.

Stockton Furniture Co., 1210 Stockton Street, San Francisco, California.

The Strand Service, 2000 - 3rd Street, San Francisco, California.

Styles Furniture, 850 Divisadero, San Francisco, California.

Sylvan Moise, 2045 Lawton Street, San Francisco, California.

Sugarman Appliance Service, 21 Cragmont Avenue, San Francisco, California.

E. Sugarman, 3624 Geary Blvd., San Francisco, California.

Sugarman Bros., 107 Front Street, San Francisco, California.

Sunset Hardware, Mr. Lou Storak, 750 Irving Street, San Francisco, California.

Super Radio Service, 3719 Mission Street, San Francisco, California.

Superior Plbg. & Hdwe. Co., 3326 Sacramento Street, San Francisco, California.

T. J. Furniture, 701 Schrader Street, San Francisco, California.

Tedwill Home Furn., 115 Clearfield Drive, San Francisco, California.

Television & Radio Supply, 1321 Mission Street, San Francisco, California.

Television of San Francisco, 659 Geary Street, San Francisco, California.

Tiedeman's, 3471 Mission Street, San Francisco, California.

Ed Tigges Jewelry, 5847 Geary Blvd., San Francisco, California.

The Time Shop, 1661 Fillmore Street, San Francisco, California.

Ti Sun Co., 1123 Grant Avenue, San Francisco, California.

Tom's Radio Store, 664 Broadway, San Francisco, California.

Transvision of California, 3471 California Street, San Francisco, California.

M. A. Tufo Jewelry Co., 133 Geary Street, San Francisco, California.

Tuggey West-Portal Hardware, 66 West Portal, San Francisco, California.

N. T. Turner, 704 Market Street, San Francisco, California.

Underwood Hardware Co., 538 Castro Street, San Francisco, California.

Union Furniture Store, 2075 Mission Street, San Francisco, California.

Union Hardware, 2154 Union Street, San Francisco, California.

United California Theaters, 172 Golden Gate Avenue, San Francisco, California.

United Purchasing Agency, 386 Geary Street, San Francisco, California.

United TV & Service, 2838-24th Street, San Francisco, California.

Universal Merchandise, 1134 Mission Street, San Francisco, California.

Valencia Appliance Repair, 581 Valencia Street, San Francisco, California.

Vanoni Radio, 3452 Mission Street, San Francisco, California.

Van Zee's, 2244 Chestnut Street, San Francisco, California.

Variety Service Shop, 830 Taraval Street, San Francisco, California.

Verna Ramey, 1375 Mission Street, San Francisco, California.

Vertex Electric Co., 4334-36 Geary Blvd., San Francisco, California.

Carl Wald Co., 268 Mission Street, San Francisco, California.

Walgreen Drug Co., 981 Market Street, San Francisco, California.

Walgreen Drug Co., 135 Powell Street, San Francisco, California.

Walgreen's, 245 Winston Drive, San Francisco, California.

Wally's TV & Appl., 2345 Mission Street, San Francisco, California.

Walton & O'Day, 1657 Market Street, San Francisco, California.

Washing Machine Parts Co., Inc., 45 Rhode Island Street, San Francisco, California.

Washington Appliance Co., 2998 Washington Street, San Francisco, California.

Waxman Pharmacy, 2101 Fillmore Street, San Francisco, California.

Weinstein & Co., 1041 Market Street, San Francisco, California.

Wenzel & Co., 255 California Street, San Francisco, California.

West Portal Radio & Record Shop, 78 West Portal Avenue, San Francisco, California.

Western Contract Furnishers, 1345 Mission St., San Francisco, California.

Western Hardware & Tool Co., 122 - 10th Street, San Francisco, California.

Western Surgical Supply, 544 Mission Street, San Francisco, California.

The White House, Mr. F. Wood, Sutter & Grant Avenue, San Francisco, California.

Wiley Furniture Co., 2098 Market Street, San Francisco, California.

Walter Wiley, 691 Market Street, San Francisco, California.

Winkel's Baby Shop, 1227 Taraval Street, San Francisco, California.

Chas. H. Wright, c/o J. C. Penney Co., 5th & Market Streets, San Francisco, California.

World Distributors, Inc., 760 Market Street, San Francisco, California.

World Wide Trading, 210 California Street, San Francisco, California.

Wyckoff & Associates, 140 Geary Street, San Francisco, California.

Yick & Co., 1241 Stockton Street, San Francisco, California.

Frank Yick & Co., 772 Pacific Avenue, San Francisco, California.

Mike Yob's Appliance, 1465 Haight Street, San Francisco, California.

Young Bros., 2301 Mission Street, San Francisco, California.

Henry M. Zais, 849 Mission Street, San Francisco, California.

Zemansky & Fass, c/o The White House, Sutter & Grant Avenue, San Francisco, California.

Zukor's, 885 Market Street, San Francisco, California.

7. The following retailers in the Mission District of the City of San Francisco are on the books of the General Electric Supply Company as traffic appliance and radio dealers:

A-K Radio, 3804 - 17th Street, San Francisco, California.

A&M Merchandising, 1041 Mission Street, San Francisco, California.

Apartment Supply Company, 554 Mission Street, San Francisco, California.

Arc Electric Co., 4750 Mission Street, San Francisco, California.

Associated Home Furniture, 1370 Mission Street, San Francisco, California.

Atlas Radio & Appliance Co., 3242 - 22nd Street, San Francisco, California.

B G M Radio, 2412 Mission Street, San Francisco, California.

Bechler & Schwab Furn. Co., 4614 Mission Street, San Francisco, California.

Bell Electric Co., 599 Castro Street, San Francisco, California.

Belview Appliance, 5515 Mission Street, San Francisco, California.

Bordelli Hdwe. & Sptg. Gds. Co., 4537 Mission Street, San Francisco, California.

Henry Brilliant, Jewelers, 2351 Mission Street, San Francisco, California.

Bunney Hardware, 2613 Mission Street, San Francisco, California.

Burton & Rose, 745 Mission Street, San Francisco, California.

Calleja Furniture, 1667 Revere Avenue, San Francisco, California.

Central Appliance, 2967 Mission Street, San Francisco, California.

Cherin Furniture Co., 737 Valencia Street, San Francisco, California.

Christophe's, 2388 Mission Street, San Francisco, California.

Clark's Furniture, 1625 Mission Street, San Francisco, California.

J & L Cleary, 3215 Mission Street, San Francisco, California.

Christofani & Muzio, 1375 Mission Street, San Francisco, California.

Dalziel Plumbing Supplies, 2741-16th Street, San Francisco, California.

Davis Furniture, 981 Mission Street, San Francisco, California.

Jack Dougal's Jewelry, 2460 Mission Street, San Francisco, California.

Dowd-Seid Electric, 2118 Mission Street, San Francisco, California.

Doyle Furniture Co., 821 Mission Street, San Francisco, California.

Duart Mfg. Ltd., 984 Folsom Street, San Francisco, California.

Norman Dvorson & Son, 1008 Mission Street, San Francisco, California.

Electrical Appliance Service, 1434 Howard Street, San Francisco, California.

Ets-Hokin & Galvan, 551 Mission Street, San Francisco, California.

Excelsior Camera Shop, 4661 Mission Street, San Francisco, California.

F & R Enterprises, 968 Valencia Street, San Francisco, California.

Family Furniture, 1943 Mission Street, San Francisco, California.

Fedeli Electric Co., 1766 Mission Street, San Francisco, California.

Ferrera Bros. Hardware, 4540 Mission Street, San Francisco, California.

Ferrera Variety & Hdwe. Store, 4653 Mission Street, San Francisco, California.

Galli Furniture, 1200 Valencia Street, San Francisco, California.

Gernhardt - Strohmaier Company, 2205 Mission Street, San Francisco, California.

Goodyear Service Stores, 11th & Mission Streets, San Francisco, California.

Charles Gottfried Co., 619 Mission Street, San Francisco, California.

Granat Bros., 2390 Mission Street, San Francisco, California.

Hale's TV & Appliance Store, 2565 Mission Street, San Francisco, California.

Hervey's Television, 2627 Mission Street, San Francisco, California.

Home Furniture Co., 3201 Mission Street, San Francisco, California.

Imperial Furniture Co., 1375 Mission Street, San Francisco, California.

Kay Jewelry Co., 2548 Mission Street, San Francisco, California.

Kindell & Graham, 782 Mission Street, San Francisco, California.

Jim Kock Home Furnishings, 2071 Mission Street, San Francisco, California.

S. H. Kress & Co., 2712 Mission Street, Store 873, San Francisco, California.

Lachman Brothers, 16th & Mission Streets, San Francisco, California.

Lee Furniture Co., 2838 Mission Street, San Francisco, California.

Mahoney Electric, 1375 Valencia Street, San Francisco, California.

Majestic Store, 2474 Mission Street, San Francisco, California.

Walter Mayer Refrigeration Supply, 1397 Valencia Street, San Francisco, California.

W. G. Menary, 3125 Mission Street, San Francisco, California.

Meyers Self Serv. Stores, 4049 - 24th Street, San Francisco, California.

Modern House, 3265 - 16th Street, San Francisco, California.

Geo. V. Nichols, 2647 - 24th Street, San Francisco, California.

Olson Jewelers, 2471 Mission Street, San Francisco, California.

Pacific Appliance Co., 2767 Mission Street, San Francisco, California.

Pacific Radio-Television Co., 2260 Mission Street, San Francisco, California.

Pallas Bros. TV, 5000 Mission Street, San Francisco, California.

Pyramid Sound Laboratories, 1201 Sutter Street, San Francisco, California.

Redlick's, 17th & Mission Street, San Francisco, California.

George Anthony Ross, 1375 Mission Street, San Francisco, California.

Sage, Inc., 1583 Howard Street, San Francisco, California.

Sales Associates, 780 Harrison Street, San Francisco, California.

Saltzman Bros., 719 Mission Street, San Francisco, California.

San Francisco Furniture Co., 839 Mission Street, San Francisco, California.

Sewing Machine Exchange, 1131 Mission Street, San Francisco, California.

Shaff's Furniture Co., 2868 Mission Street, San Francisco, California.

Sherman-Clay & Co., 2539 Mission Street, San Francisco, California.

Sherry & Guglielmo, 621 Mission Street, San Francisco, California.

Standard Furniture, 3124-24th Street, San Francisco, California.

Stanley's Radio & Tele. Service, 3043-16th Street, San Francisco, California.

State Furniture Co., 879 Mission Street, San Francisco, California.

State Radio & Music Co., 2796 Mission Street, San Francisco, California.

E. Stein & Co., 1375 Mission Street, San Francisco, California.

Super Radio Service, 3719 Mission Street, San Francisco, California.

Television & Radio Supply, 1321 Mission Street, San Francisco, California.

Tiedeman's, 3471 Mission Street, San Francisco, California.

Union Furniture Store, 2075 Mission Street, San Francisco, California.

United TV & Service, 2838 - 24th Street, San Francisco, California.

Universal Merchandise, 1134 Mission Street, San Francisco, California.

Valencia Appliance Repair, 581 Valencia Street, San Francisco, California.

Vanoni Radio, 3452 Mission Street, San Francisco, California.

Verna Ramey, 1375 Mission Street, San Francisco, California.

Carl Wald Co., 268 Mission Street, San Francisco, California.

Wally's TV & Appl., 2345 Mission Street, San Francisco, California.

Western Contract Furnishers, 1345 Mission Street, San Francisco, California.

Western Hardware & Tool Co., 122 - 10th Street, San Francisco, California.

Western Surgical Supply, 544 Mission Street, San Francisco, California.

Young Bros., 2301 Mission Street, San Francisco, California.

Henry M. Zais, 849 Mission Street, San Francisco, California.

While there may be variations as to individual dealers in the various categories above set forth since the filing of the complaint herein such variations would not be significant. The above list fairly

represents the dealers in the respective categories at the time of the filing of the complaint herein and at all times mentioned in the complaint.

/s/ J. A. McGEE

Subscribed and sworn to before me this 22nd day of June, 1956.

[Seal] /s/ JEANNE E. ALLSHOUSE,
Notary Public in and for the City and County of San Francisco, State of California. My Commission Expires February 19, 1957.

[Title of District Court and Cause.]

AFFIDAVIT OF DORE SCHWAB, JR., IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

State of California
City and County of San Francisco—ss.

Dore Schwab, Jr., being first duly sworn, deposes and says:

I am now, and was at all times herein mentioned, general manager of defendant Olympic Television of Northern California, Inc.

Olympic Television of Northern California is, and at all times since August, 1955, has been, the distributor in the City and County of San Francisco, State of California, of radio and television sets manufactured by defendant Olympic Radio & Television, Inc., and is, and at all times since August, 1955, has been engaged in selling said radio

and television sets to retailers located in San Francisco for resale by them to the public. I have personal knowledge of the persons, firms and corporations who are selling, or have at any time herein mentioned sold, said radio and television sets at retail in San Francisco.

On February 23, 1956, there were, and there now are, 33 retail stores located in San Francisco selling radio and television sets manufactured by the defendant Olympic Radio and Television, Inc. On February 23, 1956, there were, and there now are, 12 retail stores located in the Mission District of San Francisco selling radio and television sets manufactured by the defendant Olympic Radio and Television, Inc., to-wit:

Name of Store and Address—
Klor's Inc., 2581 Mission Street
A. K. Radio, 3870 - 17th Street
BGM Radio & Television Co., 2412 Mission St.
Bond Home Furniture, 2224 Mission Street
Eureka Radio & TV Lab., 4119 - 18th Street
Hale's Appliance Stores, 2565 Mission Street
Mission Radio & Gun Repair Co., 3361 Mission Street
Modern House, 3265 - 16th Street
Thomsens, 5451 Mission Street
Tiedeman Appliance, 3471 Mission Street
Wally's Television, 2345 Mission Street
Young Bros. TV, 19th and Mission Streets

Affiant is informed and believes and upon such information and belief alleges that during the period covered by the complaint in this action defend-

ant Olympic Radio and Television, Inc., did not sell radio and/or television sets manufactured by it to the plaintiff.

/s/ DORE SCHWAB, JR.

Subscribed and sworn to before me this 10th day of July, 1956.

[Seal] GLADYS C. OKERSTROM,
Notary Public in and for the City and County of San Francisco, State of California. My Commission Expires: 10/28/56.

[Title of District Court and Cause.]

AFFIDAVIT OF HELEN H. HOGUE IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

State of California
City and County of San Francisco—ss.

Helen H. Hogue, being first duly sworn, deposes and says:

1. I am the San Francisco Office Manager for Tappan Stove Company, one of the defendants in the above entitled cause, and have been in the employ of Tappan Stove Company since May 8, 1947.

2. Tappan Stove Company manufactures only cooking ranges. It sells such ranges to retailers located in San Francisco and elsewhere for resale by them to the public. As San Francisco Office Manager I have personal knowledge of the persons, firms and corporations who are selling, or have at

any time herein mentioned sold, said ranges at retail in San Francisco.

3. At all times since January 1, 1952, the ranges of Tappan Stove Company have been sold by it directly to at least thirteen stores located in San Francisco, which have resold said ranges at retail. Said stores which were, on February 23, 1956, and are now selling said ranges include:

The Emporium, 835 Market Street, San Francisco, California.

The Emporium, 1 Stonestown, San Francisco, California.

Dohrmann's, 281 Geary Street, San Francisco, California.

On February 23, 1956, there were, and there now are, thirteen retail stores located in San Francisco selling said Tappan ranges.

4. At all times since January 1, 1952, there have been a minimum of two stores located in the Mission District of San Francisco selling said Tappan ranges at retail. On February 23, 1956, there were, and there now are, two retail stores located in said Mission District selling said Tappan ranges, to-wit:

Lee Furniture Co., 2838 Mission Street.

Clark Furniture Co., 2225 Mission Street.

At all times since January 1, 1952, Tappan Stove Company has, within the normal period for deliveries, filled all orders received by it from said stores in the Mission District for its ranges; the said stores have maintained an inventory of Tappan ranges and have actively promoted the sale thereof to the public in San Francisco.

5. I have in my custody and control the sales record of Tappan Stove Company relating to sales of its ranges to retail stores in San Francisco for the period from January 1, 1952, to the date of this affidavit. I have examined such records and have found none showing any sales made directly or indirectly by Tappan Stove Company to Klor's, Inc., plaintiff in this action, or to an individual by the name of George Klor, or to Broadway-Hale Stores, Inc., one of the defendants named in said action. Moreover, I have personal knowledge of the accounts in San Francisco to which Tappan Stove Company has sold since January 1, 1952, and state that during said period Tappan Stove Company did not sell its ranges to any of said companies or individual.

6. As Tappan Stove Company, during the period from January 1, 1952, to date, has sold its ranges neither to Broadway-Hale Stores, Inc., nor to Klor's, Inc., Tappan Stove Company has had no occasion to and has not pursued any policy, discriminatory or otherwise, in favor of Broadway-Hale Stores, Inc., or against Klor's, Inc.

7. As Tappan Stove Company, during the period from January 1, 1952 to date, has not sold its ranges to Flor's, Inc., said company is not, and since January 1, 1952 has not been, a customer or purchaser of Tappan Stove Company.

8. This affidavit is made in support of the motion of all defendants for summary judgment with respect to Count One of the Complaint in the above entitled action, and in support of the motion of

Tappan Stove Company for summary judgment with respect to Counts Twenty-Nine, Thirty and Thirty-One of said Complaint.

/s/ HELEN H. HOGUE

Sworn to before me and subscribed in my presence this 3rd day of July, 1956.

[Seal] /s/ RUTH GITZEL,
Notary Public in and for the City and County of San Francisco, State of California. My Commission Expires April 13, 1958.

[Title of District Court and Cause.]

AFFIDAVIT OF E. W. DERENIA IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

State of California
City and County of San Francisco—ss.

E. W. Derenia, being first duly sworn, deposes and says:

1. I am now and have been since May 1, 1952, the Northern California Manager for O'Keefe & Merritt Company, one of the defendants named in the above entitled action.

2. O'Keefe & Merritt Company manufactures cooking appliances and sells its products to retailers located in San Francisco and elsewhere for resale by them to the public. As the Northern California Manager I am in direct charge of sales made by O'Keefe & Merritt of its products in the

City and County of San Francisco and have personal knowledge of the persons, firms and corporations who are selling, or have at any time herein mentioned, sold said products at retail in San Francisco.

3. At all times since January 1, 1952 the products of O'Keefe & Merritt Company have been sold by it directly to at least forty-one stores located in San Francisco, which have resold said products at retail. Said stores include the following, which were on February 23, 1956 and are now, selling said products:

Gernhardt-Strohmaier, 18th and Mission Streets, San Francisco, California.

Macy's, Stockton at O'Farrell Streets, San Francisco, California.

Dohrmann Commercial Co., 984 Mission Street, San Francisco, California.

N. Dohrmann, 281 Geary Street, San Francisco, California.

Emporium, 835 Market Street, San Francisco, California.

Hale's, 2565 Mission Street, 753 Market Street, 867 Market Street, San Francisco, California.

Lachman Bros., 16th and Mission Streets, San Francisco, California.

Redlick's, 17th and Mission Streets, San Francisco, California.

Sterling Furniture Co., 1049 Market Street, San Francisco, California.

On February 23, 1956 there were, and there now

are, sixty-five retail stores located in San Francisco selling said O'Keefe & Merritt products.

4. At all times since January 1, 1952 there have been a minimum of 9 stores located in the Mission District involved in San Francisco selling said O'Keefe & Merritt products at retail. On February 23, 1956 there were, and there now are 10 retail stores located in said Mission District selling said O'Keefe & Merritt products, to-wit:

Gernhardt-Strohmaier, Mission and 18th Streets, San Francisco, California.

Hale's, 2565 Mission Street, San Francisco, California.

Lachman Bros., 16th and Mission Streets, San Francisco, California.

Modern House, 3265 Sixteenth Street, San Francisco, California.

Frank Newman, 2141 Mission Street, San Francisco, California.

Redlick's, 17th and Mission Streets, San Francisco, California.

Rosen Plumbing, 1672 Mission Street, San Francisco, California.

Starlight Furniture, 2211 Mission Street, San Francisco, California.

Lee Furniture, 2838 Mission Street, San Francisco, California.

Union Furniture, 2075 Mission Street, San Francisco, California.

At all times since January 1, 1952 O'Keefe & Merritt Company has, within the normal period

for deliveries, filled all orders received by it from said stores in the Mission District for its products; the said stores have maintained an inventory of O'Keefe & Merritt products, and have actively promoted the sale thereof to the public in San Francisco.

5. I have in my custody and control the sales records of O'Keefe & Merritt Company relating to sales made by it to retail stores in San Francisco for the period from January 1, 1952 to the date of this affidavit. I have examined such records and have found none showing any sales made directly or indirectly by O'Keefe & Merritt Company to Klor's, Inc., plaintiff in this action, or to an individual by the name of George Klor. Moreover, I have personal knowledge of the accounts in San Francisco to which O'Keefe & Merritt has sold since January 1, 1952 and state that during said period O'Keefe & Merritt did not sell cooking appliances of any character to said company or said individual.

6. As O'Keefe & Merritt Company, during the period from January 1, 1952, to date, has not sold to Klor's, Inc., said company is not and, since January 1, 1952, has not been a customer or purchaser of O'Keefe & Merritt Company.

7. This affidavit is made in support of the motion of all defendants for summary judgment with respect to Count 1 of the Complaint in the above entitled action, and in support of the motion of O'Keefe & Merritt Company for summary judg-

ment with respect to Counts 29, 30 and 31 of said Complaint.

/s/ EDWARD W. DERENIA

Sworn to before me and subscribed in my presence this 6th day of July, 1956.

[Seal] /s/ HELEN DOUGLAS WARREN, Notary Public in and for the City and County of San Francisco, State of California. My Commission Expires September 14, 1956.

[Endorsed]: Filed July 16, 1956.

[Title of District Court and Cause.]

ORDER

This cause came on to be heard upon motion of the plaintiff, Klor's, Inc., to add a party defendant and to amend the complaint and it appearing to the Court that counsel for Admiral Distributors, Inc., a Delaware corporation, and Admiral Distributors, Inc., a Washington corporation, have consented thereto, it is

Ordered:

(1) That the complaint be amended in the following particulars: page 1, line 16, strike out the word "Washington" and substitute in lieu thereof the word "Delaware"; count 1, page 4, line 11, strike out the word "Washington" and substitute the word "Delaware"; count 2, page 12, line 15, strike out the word "Washington" and substitute the word "Delaware"; count 32, page 83, line 4,

strike out the word "Washington" and substitute the word "Delaware";

(2) That Admiral Distributors, Inc., a Delaware corporation, be and it is hereby added as a party defendant;

(3) That Admiral Distributors, Inc., a Delaware corporation, have thirty days after disposition of the motion to dismiss to be filed herein within which to plead to the complaint;

(4) That the complaint be dismissed as to the defendant, Admiral Distributors, Inc., a Washington corporation.

Dated: July 17th, 1956.

/s/ LOUIS E. GOODMAN,
Judge

Consent:

/s/ GIRVAN PECK,
Attorney for Admiral Distributors, Inc., a Washington corporation, and Admiral Distributors, Inc., a Delaware corporation.

[Endorsed]: Filed July 17, 1956.

[Title of District Court and Cause.]

STIPULATION

It is hereby stipulated by and between plaintiff, Klor's, Inc., defendant Broadway-Hale Stores, Inc., and defendant Jefferson-Travis, Inc., an Illinois corporation, as follows:

(1) That the complaint be amended as follows: Page 1, line 22, strike out the word "New York"

and substitute the word "Illinois"; count one, page 5, line 8, strike out the word "New York" and substitute the word "Illinois"; count fourteen, page 39, line 24, strike out the word "New York" and substitute the word "Illinois"; count thirty-six, page 91, line 20, strike out the word "New York" and substitute the word "Illinois".

(2) That defendant Jefferson-Travis, Inc., having been erroneously named in the complaint as a New York corporation, it is the purpose and intent of this stipulation that the inclusion of Jefferson-Travis, Inc., an Illinois corporation, shall be as if the said Jefferson-Travis, Inc., an Illinois corporation, had been originally named herein as a defendant at the date of the filing of the complaint, and all proceedings heretofore had with respect to Jefferson-Travis, Inc., a New York corporation, shall be applicable to Jefferson-Travis, Inc., an Illinois corporation.

Dated: July 18, 1956.

/s/ IRVIN GOLDSTEIN,
Attorney for Plaintiff
GAVIN McNAB, SCHMULOWITZ, SOMMER & WYMAN,
/s/ By RONALD P. KLEIN,
Attorneys for Jefferson-Travis, Inc.

It Is So Ordered this 23rd day of July, 1956.

/s/ LOUIS E. GOODMAN,
District Judge

[Endorsed]: Filed July 23, 1956.

[Title of District Court and Cause.]

NOTICE OF MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT

To Plaintiff, Klor's, Inc., and to its Attorney, Irvin Goldstein, Esq.:

Please Take Notice that on Thursday, August 16, 1956, at 10:00 a.m., or as soon thereafter as counsel can be heard, in the courtroom of the Honorable Louis E. Goodman, Seventh and Mission Streets, San Francisco, California, defendant Olympic Radio and Television, Inc., will move the Court to dismiss Count One of the Complaint for failure to state a claim upon which relief can be granted, and for summary judgment on said Count One on the ground that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.

These motions will be based upon all the pleadings, papers and orders on file herein and upon the affidavits of Roy O. Hurd, William M. Casey, Willard H. Mixter, Parshall H. Henry, Seymour J. Cooper, Vernon S. Dallman, Robert A. Washburn, J. A. McGee, Dore Schwab, Jr., Helen H. Hogue and E. W. Derenia, and the memorandum in support of motion to dismiss and motion for summary judgment heretofore filed by defendants Broadway-Hale Stores, Inc., Admiral Corporation, Admiral Distributors, Inc. (a Delaware corporation), Whirlpool-Seeger Corporation, H. R. Basford Company, Radio Corporation of America, Leo J. Meyberg Company, Jefferson-Travis, Inc., Philco

Corporation, The Dallman Company (sued herein as Dallman Supply Company), Rheem Manufacturing Company, General Electric Company, General Electric Distributing Corporation, Olympic Television of Northern California, Tappan Stove Company and O'Keefe and Merritt Company in support of their motions to dismiss and for summary judgment as to Count One of the Complaint.

Dated: July 30, 1956.

/s/ PHILIP S. EHRLICH,
/s/ ALBERT A. AXELROD,
/s/ IRVING ROVENS,
Attorneys for Defendant Olympic Radio and Television, Inc.

Certificate of Service attached.

[Endorsed]: Filed August 7, 1956.

[Title of District Court and Cause.]

MEMORANDUM IN OPPOSITION TO MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT

* * * * *

Defendants, in effect, argue that the conspiracy cannot be within the prohibitions of the Sherman Act since the conspirators did not fix or regulate prices, limit production or distribution, or bring about a deterioration in quality. But these actions are not alone the types of conduct prohibited by the Sherman Act.

* * * * *

[Endorsed]: Filed August 13, 1956.

[Title of District Court and Cause.]

NOTICE OF MOTION OF DEFENDANT ZENITH RADIO CORPORATION TO DISMISS COUNT ONE AND FOR SUMMARY JUDGMENT ON COUNT ONE.

Please Take Notice that on Thursday, August 16, 1956 at 10:00 o'clock a.m. or as soon thereafter as counsel may be heard, in the Courtroom of Judge Louis E. Goodman, Post Office Building, Seventh and Mission Streets, San Francisco, California, defendant Zenith Radio Corporation will move the court to dismiss Count One of the Complaint for failure to state a claim upon which relief can be granted, and for summary judgment on said Count One on the ground that there is no genuine issue as to any material fact and that this defendant is entitled to judgment as a matter of law.

This motion will be based upon all the pleadings, documents, and orders on file herein and upon the affidavits of Roy O. Hurd, William M. Casey, Willard H. Mixter, Parshall H. Henry, Seymour J. Cooper, Vernon S. Dallman, Robert A. Washburn, J. A. McGee, Dore Schwab, Jr., Helen H. Hogue and E. W. Derenia attached to the Notice of Motions to Dismiss and for Summary Judgment of defendants Broadway-Hale Stores, Inc., Admiral Corporation, Admiral Distributors, Inc. (a Delaware corporation), Whirlpool-Seeger Corporation, H. R. Basford Company, Radio Corporation of America, Leo J. Meyberg Company, Jefferson-Travis, Inc., Philco Corporation, The Dallman

Company (sued herein as Dallman Supply Company), Rheem Manufacturing Company, General Electric Company, General Electric Distributing Corporation, Olympic Television of Northern California, Tappan Stove Company and O'Keefe and Merrit Company, and filed herein on July 16, 1956.

Plaintiff has waived time on this Notice of Motion.

/s/ ROBERT E. BURNS,
CRIMMINS, KENT, DRAPER & BRADLEY,
Attorneys for Defendent Zenith Radio Corporation

Memorandum of Points and Authorities

Defendant Zenith Radio Corporation adopts the Memorandum in Support of Motion to Dismiss and Motion for Summary Judgment filed herein on July 16, 1956 by certain other defendants named in the foregoing Notice of Motion.

/s/ ROBERT E. BURNS,
CRIMMINS, KENT, DRAPER & BRADLEY,
Attorneys for Defendant Zenith Radio Corporation

Affidavit of Mailing attached.

[Endorsed]: Filed August 14, 1956.

[Title of District Court and Cause.]

STIPULATION JOINING DEFENDANT EMERSON RADIO AND PHONOGRAPH CORPORATION AS MOVING PARTY TO MOTION TO DISMISS AND FOR SUMMARY JUDGMENT AS TO COUNT ONE, AND EXTENDING TIME

It Is Hereby Stipulated and Agreed by and between the respective parties hereto, through their attorneys, as follows:

1. Defendant Emerson Radio and Phonograph Corporation shall be deemed a moving party to that certain motion to dismiss Count One of the complaint and for summary judgment on said Count One, filed herein on July 16, 1956.

2. Defendants Emerson Radio and Phonograph Corporation and Jefferson-Travis, Inc. may have twenty days after determination of those motions of various defendants to dismiss or for summary judgment as to certain Robinson-Patman Act counts of the complaint, to be heard September 13, 1956, within which to plead or make such motions as they may be advised to Counts 14, 15 and 16 of the complaint on file herein.

3. The within stipulation is being entered into subject to such rights as the respective parties have under the provisions of a stipulation being entered into between them under even date in respect of

the appearance of said Emerson Radio and Phonograph Corporation in the above entitled action.

Dated: August 27, 1956.

/s/ IRVIN GOLDSTEIN,
Attorney for Plaintiff

GAVIN McNAB, SCHMULOWITZ, SOMMER & WYMAN,
/s/ By NAT SCHMULOWITZ,
/s/ By PETER S. SOMMER,
/s/ By RONALD P. KLEIN,
Attorneys for Defendants Emerson Radio and Phonograph Corporation and Jefferson-Travis, Inc.

It Is So Ordered:

/s/ LOUIS E. GOODMAN

[Endorsed]: Filed August 28, 1956.

[Title of District Court and Cause.]

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS AS TO COUNT ONE OF THE COMPLAINT

It appears from the allegations of count one of the complaint and from the undisputed affidavits supporting the motion for summary judgment that there is no genuine issue of fact respecting the

claim for relief tendered by count one of the complaint.

Count one is not a cause of action under the Sherman Anti-Trust Act. It is not concerned with private damage caused by a public wrong proscribed by the Act.

It is just the case of a retail store in the Mission District of San Francisco—one of hundreds in the city engaged in selling the same kind of merchandise—which has a plaint that certain supplier defendants won't sell it some merchandise, allegedly at the behest of one of its competitors. It is purely a private quarrel, (perhaps otherwise legally remediable) arising out of some undisclosed cause—the nature of which we may suspect, but do not know.

There is not the slightest basis either in substantiality or law for the exercise of our jurisdiction.

The motions are granted.

Present an order and judgment accordingly.

Dated: September 13, 1956.

/s/ LOUIS E. GOODMAN,
United States District Judge

[Endorsed]: Filed September 13, 1956.

In The United States District Court, Northern District of California, Southern Division

No. 35274

Klor's, Inc., Plaintiff,

vs.

Broadway-Hale Stores, Inc., Admiral Corporation, Admiral Distributors, Inc., Zenith Radio Corporation, Zenith Radio and Distributing Corporation, Whirlpool-Seeger Corporation, H. R. Basford Company, Radio Corporation of America, Leo J. Meyberg and Company, Emerson Radio and Phonograph Corporation, Jefferson-Travis, Inc., Philco Corporation, Philco Distributors, Inc., Dallman Supply Company, Rheem Manufacturing Company. General Electric Company, General Electric Distributing Corporation, Olympic Radio and Television, Inc., Olympic Television of Northern California, Tappan Stove Company, and O'Keefe and Merritt Company, Defendants.

ORDER AND JUDGMENT

The Court having heretofore on June 8, 1956 and on June 22, 1956 made its orders for separate trials by virtue of which Count One of the complaint and the claim for relief tendered thereby are to be treated in all respects as if they constituted a separate action, and defendants having thereafter severally moved to dismiss Count One of the complaint and the claim for relief tendered thereby and for

summary judgment thereon, and it appearing that there is no genuine issue of fact respecting the claim for relief tendered by said Count One,

It Is Hereby Ordered, Adjudged and Decreed that said motions to dismiss and said motions for summary judgment are and each of them hereby is granted, and that said Count One and the claim for relief tendered thereby be and they are hereby dismissed as to each and every defendant, and that plaintiff take nothing by them, and the Court hereby expressly determines that there is no just reason for delay in the entry of the foregoing judgment and the clerk is hereby expressly directed to enter the foregoing judgment forthwith.

Dated: September 18, 1956.

/s/ LOUIS E. GOODMAN
United States District Judge

Disapproved as to form.

/s/ IRVIN GOLDSTEIN
Attorney for Plaintiff

Plaintiff's motion for a rehearing is denied.

Dated: September 24, 1956.

/s/ LOUIS E. GOODMAN
United States District Judge

Entered in Civil Docket: 9/26/56.

[Endorsed]: Filed Sept. 25, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Klor's, Inc., plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order granting the Defendants' Motions to Dismiss and Motions for Summary Judgment as to Count One of the Complaint and the final judgment entered thereon in this action on September 26, 1956.

/s/ IRVIN GOLDSTEIN
Attorney for Plaintiff

Certificate of Mailing Attached.

[Endorsed]: Filed Oct. 23, 1956.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

Plaintiff sets forth the following points on which it intends to rely on appeal:

1. The District Court erred in sustaining defendants' motion to dismiss and for summary judgment.

2. The District Court erred in not overruling defendants' motion to dismiss and for summary judgment.

/s/ IRVIN GOLDSTEIN
Attorney for Plaintiff

[Endorsed]: Filed Nov. 16, 1956.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by the attorneys for appellant and appellees:

Excerpt from Docket Entries.

Complaint.

Affidavit of Hugh Robertson in Support of Motion of Zenith Radio Corporation to Quash, etc.

Amendment to Complaint.

Notice and Motion by Tappan Stove Company and O'Keefe and Merritt Company, for more definite statement, etc.

Notice by Broadway-Hale Stores, Inc., of motion to dismiss or separately state, etc.

Memorandum of Broadway-Hale Stores, Inc., in support of motion to dismiss or separately state, etc.

Stipulation for Amendment to Complaint and Extending Time for Whirlpool-Seeger to plead.

Notice of Motion of H. R. Basford Company for more definite statement and to sever, with memo of points and authorities.

Memorandum Order of Court on Separate Trials.

Order for Separate Trial as to Radio Corporation of America, et al.

Pre-trial order.

Stipulation and Order for Amendment to Complaint.

Stipulation and Order for Separate Trials as to Various Counts.

Notice of Motion to Amend Complaint, with memo.

Supplemental Affidavit of Hugh Robertson in Support of Motion of Zenith Radio Corp. to Quash and Dismiss.

Supplemental Affidavit of Hugh Robertson in Support of Motion of Zenith Radio Distributing Corp. to Quash and Dismiss.

Notice of Broadway-Hale Stores, Inc.; Admiral Corporation; Admiral Distributors, Inc.; Whirlpool-Seeger Corporation; H. R. Basford Company; Radio Corporation of America; Leo J. Meyberg Company; Jefferson-Travis, Inc.; Philco Corporation; The Dallman Company (sued herein as Dallman Supply Company); Rheem Mfg. Co.; General Electric Company; General Electric Distributing Corp.; Olympic Television of Northern California; Tappan Stove Co.; and O'Keefe and Merritt Co. to dismiss, with affidavits of the following persons, of motion for summary judgment: Roy O. Hurd, William M. Casey, Willard H. Mixter, Willard H. Mixter, Parshall L. Henry, Seymour J. Cooper, Vernon S. Dallman, Robert A. Washburn, J. A. McGee, Dore Schwab, Jr., Helen H. Hogue and E. W. Derenia.

Notice by Radio Corp. of America of Motion to Dismiss, with Memo. of Deft. and affidavits of Par-

shall L. Henry, Louis J. Collins, Joseph P. Bannon, and Harold R. Maag in Support.

Notice by Tappan Stove Co. and O'Keefe and Merritt Co. of motions to Dismiss and for Summary judgment with memo.

Order Amending Complaint.

Notice by Leo J. Meyberg Co. of motion to Dismiss and for Summary Judgment.

Stipulation and Order Amending Complaint.

Notice and motion by Olympic Radio and Television to Dismiss and for Summary Judgment.

Memorandum of Plaintiff in Opposition to Motions to Dismiss and for Summary Judgment.

Notice by Zenith Radio Corporation of motion to Dismiss and for Summary Judgment.

Stipulation and Order Joining Emerson Radio and Phonograph Corp. as Party to Motions to Dismiss and for Summary Judgment.

Order Granting Defendants' Motions to Dismiss and for Summary Judgment as to Count One of the Complaint.

Motion of Plaintiff for Rehearing and for Leave to Amend with memo.

Order and Judgment on Motions to Dismiss and for Summary Judgments.

Notice of Appeal.

Appeal Bond.

Appellant's Designation of Record on appeal.

Statement of Points Upon Which Appellant Intends to Rely on Appeal.

Designation of Record by Leo J. Meyberg Company.

Designation of Record by Zenith Radio Corporation.

Designation of Record by Emerson Radio and Phonograph Corp.

Designation of Record by Admiral Corporation and Admiral Distributors.

Designation of Record by Tappan Stove Company and O'Keefe & Merritt Co.

Designation of Record by General Electric Company and General Electric Distributing Corp.

Designation of Record by Broadway-Hale Stores, Inc.

Designation of Record by Olympic Radio and Television, Inc.

Designation of Record by Dallman Co. (sued as Dallman Supply Co.)

Designation of Record by H. R. Basford Company.

Reporter's Transcript of Proceedings May 21, 1956.

Reporter's Transcript of Proceedings, Aug. 16, 1956.

Defendants' Exhibit A, Aug. 16, 1956.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 30th day of November, 1956.

[Seal] C. W. CALBREATH
Clerk

/s/ By MARGARET P. BLAIR
Deputy Clerk

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

Monday, May 21, 1956.

HEARING ON MOTIONS

* * * * *

Mr. Lasky: Now, if the Court pleases, in due course I do want to come into this court either with a motion to dismiss or a motion for summary judgment on the Sherman Act charges, and point out to the Court by appropriate affidavit, that there must be literally hundreds of dealers in San Francisco who were still handling the exact make of appliances plaintiff talks about, and that while the plaintiff may not be selling these, there are hundreds of others who are selling them. And I wish to present at that time the mass of authorities, many of them from this very court, the Northern District of California, that the Sherman Act is not interested in whether a particular plaintiff sells a particular product or not, as long as there are many others selling them. [16]

* * * * *

The Court: Well, he says that it is a charge in his complaint under the Sherman Act, and if what he has alleged he can't prove under the Sherman Act, then he can't prove it—that's all. I don't know what great problem that raises at the moment.

Mr. Lasky: Well, I don't want him coming in later when we direct our arguments to the Sherman Act and have him slide over and say, "Yes,

but I have got independent substantive charges under Robinson-Patman in count one and I don't have to concern myself with Sherman Antitrust."

The Court: Well, I take it from what he says he has got his charges under the Robinson-Patman Act in the other counts. [36]

Mr. Lasky: He certainly has them in the other counts. Now, it seems to me he has pitchforked them into count one. Well, if counsel will now state of record explicitly that count one is Sherman Act solely, and nothing else, then at least we have got count one clarified, and if that is what he intends to make it, we don't have a problem in separately stating.

The Court: Well, unless Mr. Goldstein has some serious objection, I would be ready to make some sort of a definitive order to the effect that the first count of the indictment (complaint) charges under the Sherman Act and that the defense is entitled to answer and move to it upon that basis.

Mr. Lasky: Such an order would be satisfactory to us.

The Court: Would you have any objection to that?

Mr. Goldstein: I have been trying to tell counsel all along that the first count charges a violation of the Sherman Act.

Mr. Lasky: And no more?

The Court: You are getting ready to kiss and make up, then, already?

Mr. Lasky: Well, as long as we understand he

doesn't attempt to charge anything more, then I am happy.

The Court: Well, suppose you prepare an order to the effect of what I have stated.

Mr. Lasky: Very well. [37]

* * * * *

The Court: For the purposes of the first cause of action, it is an antitrust case.

Mr. Lasky: That is agreeable.

The Court: Have any of you objection to that? [38]

Mr. Goldstein: No, sir. [39]

* * * * *

Mr. Raven: Well, then, at best there is an inconsistency. At one point in count one there is talk about a conspiracy, and at another point in count one on page 9, line 24, there is an averment as to "combinations."

The Court: Is that a typographical error? Is there any particular meaning to that?

Mr. Goldstein: No, I think it was not intended. I certainly wouldn't try to lay more than one conspiracy.

The Court: You'd have your hands full. [44]

Mr. Goldstein: I have enough for the time being with one conspiracy, if your Honor please.

The Court: Well, any objection to the complaint being amended on its face to refer to "combination, conspiracy and agreement in restraint of trade by the manufacturer defendants here * * *"?

Mr. Goldstein: I have no objection, if it does not necessitate rewriting this complaint.

The Court: No, I don't think you should be required to.

Mr. Goldstein: May we incorporate that in the same order, if your Honor please, and get all this done with one swipe? [45]

* * * * *

[Endorsed]: Filed Oct. 22, 1956.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

Thursday, August 16, 1956

* * * * *

The Court: You're really relying, then, on not so much the motion to dismiss as on the motion for summary judgment.

Mr. Lasky: I think it's a motion for summary judgment.

The Court: You are stating that as a matter of fact that a case is not stated because of an undisputed factual situation. [20]

* * * * *

Mr. Goldstein: May it please the Court, the conspiracy charged in count one of the complaint is this: No matter how counsel may attempt to avoid it, no matter how abstruse are some of his deductions, it does amount to this and on which the plaintiff rests his case. * * * * * [34]

The Court: Well, all that I was endeavoring to

do, Mr. Goldstein, was to get the question down to a somewhat simple basis. The private right in antitrust arises out of the private damage because of the public wrong.

Mr. Goldstein: Yes, sir.

The Court: In other words, it doesn't arise out of a private wrong; it arises out of a public wrong.

Mr. Goldstein: There must be, as I have conceded, there must be some public interest.

The Court: And the private individual where there is a public wrong has only a cause of action when he can show that the public wrong caused him some damage.

Mr. Goldstein: Yes, sir. * * * * * [40]

Mr. Lasky: Now, with respect to this chart—I suppose it's a burdensome thing to get into the record, but I think we might well leave it with the Court.

The Court: You can mark it as an exhibit on these motions.

Mr. Lasky: Or we could make it a part of the affidavit. Let's mark it as Defendants' Exhibit A on this motion.

The Court: Very well. * * * * * [55]

[Endorsed]: Filed Nov. 29, 1956.

[Endorsed]: No. 15380. United States Court of Appeals for the Ninth Circuit. Klor's Inc., Appellant, vs. Broadway-Hale Stores, Inc., et al., Appellees. Transcript of Record. Appeal from the

United States District Court for the Northern District of California, Southern Division.

Filed: November 30, 1956.
Docketed: Dec. 10, 1956.

/s/ PAUL P. O'BRIEN
Clerk of the United States Court of Appeals for the Ninth Circuit.

In The United States Court of Appeals
For the Ninth Circuit

No. 15,380

KLOR'S, INC., Appellant,

vs.

BROADWAY-HALE STORES, INC., et al., Appellees.

STATEMENT OF POINTS

Appellant in the above-entitled cause hereby adopts as its statement of points on which it intends to rely on this appeal the statement of points on appeal as it now appears in the certified transcript of record herein.

* * * * *

Dated: December 18, 1956.

/s/ IRVIN GOLDSTEIN
Attorney for Appellant

Certificate of Service Attached.

[Endorsed]: Filed Dec. 19, 1956. Paul P. O'Brien, Clerk.

[fol. 148]

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—September 3, 1957 (omitted in printing).

[fol. 149]

IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Before: DENMAN, BARNES and HAMLEY, Circuit Judges.

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—March 28, 1958.

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a Judgment be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

[fol. 150]

IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 15,380

KLOR'S, INC., Appellant,

v.

BROADWAY-HALE STORES, INC., et al., Appellees.

Appeal from the United States District Court for the Northern District of California, Southern Division.

OPINION—March 28, 1958

Before: Denman, Barnes and Hamley, Circuit Judges.

BARNES, Circuit Judge:

I. The Private Plaintiff in Antitrust Litigation.

Section 4 of the Clayton Act provides:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained."

Passing for the present an examination of what "thing" is forbidden, we note a tendency in some courts to narrow the apparent scope of this statute due to concern with the severity of the penalty.[1]

In a recent case this Court said:

> "A niggardly construction of the treble damage provision would do violence to the clear intent of Congress. [fol. 151] The private antitrust action is an important and effective method of combating unlawful and destructive business practices. The private suitor complements the government in enforcing the antitrust laws. The treble damage provision was designed to foster and stimulate the interest of private persons in maintaining a free and competitive economy. Its efficacy should not be weakened by judicial construction." *Flintkote Co.* v. *Lysfjord*, 246 F.2d 368, 398, cert. denied, 355 U.S. 835 (1957).

Of more importance is what the Supreme Court has said. In reversing an antitrust case from this Circuit in 1957, that Court admonished the trial and appellate federal courts that:

> "Petitioner's claim need only be 'tested under the Sherman Act's general prohibition on unreasonable restraints of trade,' [citing cases] and meet the requirement that petitioner has thereby suffered injury."[2]

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[1] *Snow Crest Beverages Inc.* v. *Recipe Foods, Inc.*, D.Mass., 1956, 147 F.Supp. 907, 909; *Harrison* v. *Paramount Pictures Inc.*, E.D. Penn. 1953, 115 F.Supp. 312; *Cf: Congress Bldg. Group* v. *Loews, Inc.*, 7 Cir., 1957, 246 F.2d 587.

[2] *Radovich* v. *National Football League*, 1957, 352 U.S. 445, 453:

"Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. These laws protect the victims of the forbidden practices as well as the public. [Citing cases] Furthermore, Congress itself has placed the private antitrust litigant in a most favorable position through the enactment of §5 of the Clayton Act. [Citing cases] In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws." *Ibid.*

With these principles in mind, we proceed to an examination of what is forbidden by the antitrust laws, as stated in Section 4 of the Clayton Act.

The Sherman Act's first and second sections are relied on by the pleadings in this case.[3]

[fol. 152] Does the Sherman Act mean *every* contract, and *every* restraint, or must it be interpreted? Must it be aided by a Rule of Reason, and if so, what is that Rule of Reason? The problem is not a new one, nor is it easy. Not only do competent judges disagree—they frequently reach similar destinations by differing circuitous routes.[4]

Suffice it to say that from a period shortly after the early pronouncements of our Supreme Court which made the Sherman Act a comparatively dead law,[5] succeeding Supreme Court Justices have found it necessary to interpret the precise language used in the Act and determine its proper construction.[6] Even such a "literalist" as Mr. Justice Peckham eventually came to that view,[7] at least with

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[3] 15 U.S.C. §1: "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States . . . is declared to be illegal, ..."

15 U.S.C. §2: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce . . . shall be deemed guilty of a misdemeanor. . . ."

[4] "Unity of decision does not always require unit of theory." Handler, Antitrust in Perspective 11 (1957).

[5] See, *e.g.*, *United States* v. *E. C. Knight Co.*, 1895, 156 U.S. 1.

[6] Compare *United States* v. *Joint Traffic Association*, 1898, 171 U.S. 505, 567-8, with *United States* v. *Trans-Missouri Freight Ass'n*, 1897, 166 U.S. 290, 312, where similar contracts with similar purposes (design to fix freight rates) were under consideration.

[7] "The Act of Congress must have a reasonable construction or else there would scarcely be an agreement or contract among businessmen that could not be said to have, indirectly or remotely, some bearing on interstate commerce and possibly to restrain it." *Hopkins* v. *United States*, 1898, 171 U.S. 578, 600.

[8] Professor Handler tells how Mr. Justice White "avoided the embarrassment of the word 'every' in two ways. First, he regarded the Sherman Act as codifying the common law and . . . embodying the same rule of reason sanctioned by prior law. 16/ (United States v. Trans-Missouri Freight Asso., 1897, 290, 353-356.) Sec-

regard to what constituted interstate commerce, even if he could not agree with Mr. Justice White on what was meant by "every restraint." And, although the statutory [fol. 153] language "is literally all encompassing, the courts have construed it as precluding only those contracts or combinations which 'unreasonably' restrain competition." [8a]

With this brief introduction, let us turn to the pleadings and evidence of this case.

II. The Pleadings.

Plaintiff corporation sues many defendants, claiming a cause of action under Sections 4 and 16 of the Clayton Act,[9] by reason of defendants' alleged violation of Sections 1 and 2 of the Sherman Act.[10]

The complaint alleges plaintiff is the owner and operator of a retail store engaged in the business in San Francisco of selling radios, television sets, clothes washers, refrigerators, electric and gas stoves, phonographs and vari-

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ond, he asserted that the phrase 'restraint of trade,' both in the prior decisions and the statute, signified illicit arrangements only. 17/ (*Id.* at 345-352.) Under this view, if an agreement was reasonable, it was not in restraint of trade. According to White's theory, the rule of reason had been built into the very words and structure of the legislation. . . . • • •

White . . . in his *Standard Oil* and *American Tobacco* (*United States* v. *American Tobacco Co.*, 1911, 221 U.S. 106) opinions . . . by this strained rationale . . . finally succeeded in introducing a rule of reason into our antitrust jurisprudence. • • •

Under (Mr. Justice) Taft's view, there was no place for a rule of reason where the restrictions on competition were nonancillary. • • • . . . [T]he English courts had . . . abandoned the initial rule of total invalidity (of restraints of trade) and enforced agreements not to compete when ancillary to some major lawful purpose and reasonable in duration and extent. . . . • • •

. . . [C]ommon law . . . did not employ the phrase 'restraint of trade' synonymously with illegality." Handler, Antitrust in Perspective, 11 (1957).

[8a] *Northern Pacific Railway Co.* v. *United States*, 1958, 355 U.S. 649, 651, citing *Standard Oil Co. of New Jersey* v. *United States*, 1911, 221 U.S. 1, and *Chicago Board of Trade* v. *United States*, 1918, 246 U.S. 231.

[9] Title 15 U.S.C. §§15, 26.

[10] Title 15 U.S.C. §§1, 2.

ous electrical appliances. Plaintiff charges defendant Broadway-Hale Stores, Inc., a corporation, is a competitor in the purchase and sale of such household appliances, operating a chain of stores in the western states and one specific store in the general vicinity of plaintiff's retail store in the Mission District area of San Francisco, California. The eighteen other defendants named are ten lead- [fol. 154] ing manufacturers[11] and eight distributors[12] of such household appliances mentioned above.

Plaintiff charges that all defendants beginning prior to 1952 "have restrained trade and commerce in the interstate distribution and sale" of the described types of goods in the San Francisco area "by contracting, combining, conspiring together, and each with the other in restraint and monopoly of such trade and commerce" and "have substantially lessened, limited, and restrained competition in said trade and commerce."[13]

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[11] Admiral Corporation; Zenith Radio Corporation; Whirlpool-Seeger Corporation; Radio Corporation of America; Emerson Radio and Phonograph Corporation; Philco Corporation; Rheem Manufacturing Company; General Electric Company; Olympic Radio and Television, Inc.; and Tappan Stove Company.

[12] Admiral Distributors, Inc.; H. R. Basford Company; Leo J. Meyberg; Jefferson-Travis, Inc.; Philco Distributors, Inc.; General Electric Dist. Corporation; Olympic Television of Northern California; and O'Keefe and Merritt Company.

[13] Plaintiff's pertinent allegations were:

"• • • 6. • • • Beginning at a period prior to 1952, and continuing uninterrupted up to and including the date of filing this complaint, the defendants, all well knowing the facts herein alleged, have restrained trade and commerce in the interstate distribution and sale of radios, television sets, clothes washers and dryers, refrigerators, electric and gas ranges, phonographs and electric appliances in the San Francisco Bay Area, by contracting, combining, conspiring together, and each with the other, in restraint and monopoly of such trade and commerce contrary to Sections 1 and 2 of the Act of Congress . . . 15 U.S.C.A., Sections 1 and 2, and have thereby substantially lessened, limited and restrained competition in said trade and commerce, and have prevented plaintiff from obtaining (the above articles) for resale; and have discriminated against plaintiff and in favor of plaintiff's competition in the sale and distribution of the products; and have refused to sell to or enter into any contract to sell products to plaintiff. Such combination, conspiracy and agreement tend to and do actually restrain

[fol. 155] Various alleged discriminations in sale, supply, price, terms, etc., are charged in count one of the complaint as part of the conspiracy. Counts two through thirty-one charge violations of the Robinson-Patman Act[14] and counts thirty-two through forty-one charge violations of § 13(f) of the Robinson-Patman Act[15]—discrimination in price, services, etc.

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and monopolize interstate commerce in the distribution and sale of (the listed products) in favor of Hale. More particularly, the manufacturer-distributor defendants in pursuing a policy in favor of Hale and against plaintiff have done and are continuing to do the following acts:" There then follows a list of nine particular acts which defendants are alleged to have done, all directed solely at plaintiff and in favor of the defendant Broadway-Hale. • • •

"8. The defendant Hale operates a chain of key stores in the west coast area of the United States. It enjoys a monopolistic buying power by reason of the large number of retail outlets it operates. It has used its monopolistic buying power to negotiate terms and conditions of acquisition and purchase of the products manufactured, distributed and sold by the manufacturer-distributor defendants. It has used its monopolistic buying power to deny to plaintiff its competitive position in the acquisition, purchase and sale of the products manufactured, distributed and sold by the manufacturer-distributor defendants and, in particular, has purchased and continues to purchase the products of the manufacturer-distributor defendants upon the condition that the manufacturer-distributor defendants do not sell their products to the plaintiff. The manufacturer-distributor defendants have dealt with Hale throughout the period of time alleged on a chain basis and have manufactured, distributed and sold products for resale in the San Francisco Bay Area in consideration of manufacturing, distributing and selling the products to Hale for resale in other parts of the West Coast area of the United States. • • •

"9. By reason of the monopoly buying power of defendant Hale, and the illegal and discriminatory tactics, combinations, conspiracies and agreements in restraint of trade by the manufacturing-distributor defendants acting in collaboration, the business of plaintiff has been seriously impaired, injured and damaged, and the plaintiff has suffered great damage in loss of profits, good will, reputation and prestige of its store as a retail dealer in (the listed products). Plaintiff has been paying unreasonable and discriminatory prices and has been subjected to unfair, unreasonable and discriminatory practices to the damage and loss of plaintiff and to the advantage of defendants, all by reason of the defendants' violation of the anti-trust laws."

[14] Title 15 U.S.C. §13(a), (d) and (e).

[15] Title 15 U.S.C. §13(f).

III. Proceedings in the District Court.

By pre-trial order count one was limited to a single conspiracy charging a Sherman Act violation.[16]
[fol. 156] Subsequently, under Federal Rules of Civil Procedure 42(b), the trial court ruled:

> "Count one of the complaint and the claim for relief tendered thereby are to be treated in all respects as if they constituted a separate action."

All but one of the defendants (18 of 19) then moved to dismiss count one of the complaint,

> ". . . for failure to state a claim upon which relief can be granted, and for summary judgment on said Count One on the ground that there is no genuine issue as to any material fact and the moving parties are entitled to a judgment as a matter of law."

In support of this motion, the moving parties submitted a dozen affidavits. Appellant stood on the pleadings and papers on file, filing no documents in opposition to the motion. It should be noted here that the court below did not rule on the pleadings nor grant the motion to dismiss by reason of any failure therein. While a motion to dismiss was made, it was apparently passed over so that the motion for summary judgment could be determined. That latter motion having been granted, it was necessarily dispositive of the motion to dismiss.

The District Court granted the motion for summary judgment by preliminary order and subsequent formal judgment.[17] The preliminary order is short, and reads as follows:

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[16] "1(a) . . . Count one of the Complaint is and shall in all further proceedings be interpreted and construed as one seeking relief solely with respect to a conspiracy under the Sherman Act . . . and not as seeking to assert any claim for relief under the Robinson-Patman Act. . . .

(b) Count one of the Complaint is amended by striking the words 'combinations, conspiracies and agreements' in paragraph 9, . . . and substituting the words 'combinations, conspiracy and agreement'. . . ." (Tr. p. 20.)

[17] "The Court having heretofore on June 8, 1956 and on June 22, 1956 made its orders for separate trials by virtue of which Count

[fol. 157] "It appears from the allegations of count one of the complaint and from the undisputed affidavits supporting the motion for summary judgment that there is no genuine issue of fact respecting the claim for relief tendered by count one of the complaint.

Count one is not a cause of action, under the Sherman Anti-Trust Act. It is not concerned with private damages caused by a public wrong proscribed by the Act.

It is just the case of a retail store in the Mission District of San Francisco—one of hundreds in the city engaged in selling the same kind of merchandise—which has a plaint that certain supplier defendants won't sell it some merchandise, allegedly at the behest of one of its competitors. It is purely a private quarrel, (perhaps otherwise legally remediable) arising out of some undisclosed cause—the nature of which we may suspect, but do not know.

There is not the slightest basis either in substantiality or law for the exercise of our jurisdiction.

The motions are granted. . . ."

This appeal is from the motion granting summary judgment. Count one alone is involved. The other forty counts are not before us.

One of the complaint and the claim for relief tendered thereby are to be treated in all respects as if they constituted a separate action, and defendants having thereafter severally moved to dismiss Count One of the complaint and the claim for relief tendered thereby and for summary judgment thereon, and it appearing that there is no genuine issue of fact respecting the claim for relief tendered by said Count One,

It Is Hereby Ordered, Adjudged and Decreed that said motions to dismiss and said motions for summary judgment are and each of them hereby is granted, and that said Count One and the claim for relief tendered thereby be and they are hereby dismissed as to each and every defendant, and that plaintiff take nothing by them, and the Court hereby expressly determines that there is no just reason for delay in the entry of the foregoing judgment and the clerk is hereby expressly directed to enter the foregoing judgment forthwith. . . ." [Tr. pp. 135, 136.]

IV. The Issues.

Appellant makes but one specification of error—namely, that it was error to grant a motion for judgment or dismiss [fol. 158] a complaint seeking damages under § 4 of the Clayton Act based upon an alleged violation of the Sherman Act plus consequent damage to plaintiff because the complaint had failed to allege and plaintiff had failed to prove, as an additional element, a "public injury."

Appellees do not agree that the trial court's action (and alleged error) can be so described. They agree that if there has been alleged a violation of the Sherman Act, plus consequent damage to a private plaintiff, a cause of action is stated. They claim a violation of the Sherman Act was not pleaded, and more important, not established by the evidence before the court on the motion to dismiss. This was because the restraint of trade relied on was not a restraint of trade recognized as such at common law which constitutes a per se violation of the Sherman Act; and in the absence of such a type of violation, there must be alleged a restraint, injurious to the public if proved, in order to constitute an actionable violation of the Sherman Act, either in pleading or proof. The question before the trial court, say appellees, and now here, is this:

> "(1) Is the charged restraint of trade of a kind falling within the purview of the Sherman Act?"

and secondarily,

> "(2) Does the conspiracy have the necessary relation to interstate commerce?"

Both questions must be answered affirmatively, say appellees, before appellant can prevail.

To put it another way, appellant contends that *any* contract, combination or conspiracy which restrains trade or commerce, no matter in what degree and no matter against whom or how many persons similarly situated the restraint is directed, *always* violates the Sherman Act proscription.

Appellant argues that

> "[T]he public in any part of interstate commerce is entitled to the competition of *all* traders and the public

> interest is *necessarily* impaired when *a* trader is eliminated. . . . The antitrust laws are a trader's statute [fol. 159] which protect the trader from unlawful conduct in restraint of trade in order to insure that the public obtains a true competitive market." [18]

Appellees, on the other hand, contend with equal vigor that not every restraint upon a single competitor is a restraint of trade or commerce within the meaning of the Sherman Act. They argue, in essence, that a plaintiff, in order to succeed on this motion for summary judgment must allege in his complaint (if he is willing to rely solely upon it in opposition to appellees' affidavits) sufficient facts to prove, or from which it may be inferred, that the public as a whole is or may be in some way affected by the defendants' conduct; *i.e.*, that the conduct attacked has some *substantial* effect on the particular relevant market involved.

Appellant quotes at length from, and largely relies upon, both the briefs filed and the opinion rendered in *Radovich* v. *National Football League*,[19] certain motion picture antitrust cases, e.g. such as *United States* v. *Paramount*, 1948, 334 U.S. 131; *United States* v. *Schine*, 1948, 334 U.S. 110; *United States* v. *Griffith*, 1948, 334 U.S. 100; *Bigelow* v. *R.K.O.*, 1946, 327 U.S. 251; *Binderup* v. *Pathe*, 1923, 263 U.S. 291; *Hart* v. *B. F. Keith Vaudeville Exchange*, 1923, 262 U.S. 271, and pleadings cases like *United States* v. *Employing Plasterers Ass'n.*, 1954, 347 U.S. 186.

It is appellant's position that "Radovich . . . overruled this court and thus overruled its principal supports, *Fedderson*[20] and *Shotkin*." [21]

Appellees urge that they have carefully maneuvered around the pitfall of a motion to dismiss premised on the pleadings; that they have filed twelve affidavits uncontradicted by anything other than the complaint, as amended by

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[18] Appellant's Opening Brief, p. 7. (Emphasis added.)

[19] 352 U.S. 445 (1957).

[20] 180 F. 2d 519 (10 Cir. 1950).

[21] 171 F. 2d 236 (10 Cir. 1948).

[fol. 160] pre-trial order;[22] that the court passed on an "undisputed factual situation;"[23] and, that the trial court's finding and the summary judgment based thereon is required by §§ 1 and 2 of the Sherman Act, as interpreted by the Supreme Court, particularly in *Apex Hosiery* v. *Leader*, 1940, 310 U.S. 469, and those cases which are claimed to follow it.

V. The Facts.

The facts, as set forth in the affidavits, and undisputed by appellant, were summarized by appellees as follows:

> "Appellant and appellee Hale are not the only retailers of appliances in San Francisco. There are literally hundreds, if not thousands, of others (R. 25-27). The classified section of the San Francisco Telephone Directory contains 14 pages of listings (R. 29-43). In San Francisco alone are sold not only the brands of appliances involved in this case but many other com-

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[22] The voluntary amendment of the complaint as to damages is here immaterial.

[23] "The Court: You're really relying, then, on not so much the motion to dismiss as on the motion for summary judgment.

Mr. Lasky: I think it's a motion for summary judgment.

The Court: You are stating that as a matter of fact that a case is not stated because of an undisputed factual situation. • • •

Mr. Goldstein: May it please the Court, the conspiracy charged in count one of the complaint is this: No matter how counsel may attempt to avoid it, no matter how abstruse are some of his deductions, it does amount to this and on which the plaintiff rests his case. • • •

The Court: Well, all that I was endeavoring to do, Mr. Goldstein, was to get the question down to a somewhat simple basis. The private right in antitrust arises out of the private damage because of the public wrong.

Mr. Goldstein: Yes, sir.

The Court: In other words, it doesn't arise out of a private wrong; it arises out of a public wrong.

Mr. Goldstein: There must be, as I have conceded, there must be some public interest.

The Court: And the private individual where there is a public wrong has only a cause of action when he can show that the public wrong caused him some damage.

Mr. Goldstein: Yes, sir. • • • " [Tr. pp. 145, 146.]

peting brands (R. 26-27). In addition to the 7 brands of television sets, radio and phonographs mentioned in the complaint, there are 20 other competing brands sold in San Francisco. In addition to the three men- [fol. 161] tioned brands of refrigerators there are 18 other competing brands. In addition to the 5 mentioned brands of stoves, there are 23 competing brands; in addition to the 2 mentioned brands of clothes washers and dryers, there are 30 competing brands. Among these competing brands are many of the outstanding and most widely advertised brands in the country, including the names Capehart, Crosely, Du Mont, Hallicrafter, Hoffman, Magnavox, Motorola, Packard-Bell, Scott, Westinghouse, Amana, Bendix, Coldspot, Frigidaire, Hotpoint, International Harvester, Kelvinator, Norge, Servel, Chambers, Roper, Thermador, Western Holly (see listing at R. 26-27). Appellant does not charge that he was denied the right to handle any of this vast number of brands manufactured and sold by companies not parties to this action.

Moreover, a large number of other retailers sell to the San Francisco public the very brands referred to in the complaint. At the date of filing suit the number of dealers *in San Francisco* handling these products was as follows: (See note 24/.)

In the *Mission District alone,* in San Francisco, there are 53 dealers selling the brands referred to in the complaint. Restricting the area under consideration even more narrowly, *to Mission street alone,* a member of

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[24] "Admiral products ..... 195 retailers (R. 45)
Zenith products ..... 153 retailers (R. 48)
Whirlpool products ..... 67 retailers (R. 50)
RCA products ..... 127 retailers (R. 52)
Emerson products ..... 109 retailers (R. 54)
Philco products ..... 175 retailers (R. 58)
Rheem products ..... 56 retailers (R. 62)
GE products ..... 110 retailers (R. 66)*
Olympic products ..... 33 retailers (R. 116)
Tappan products ..... 13 retailers (R. 118)
O'Keefe & Merritt products ..... 65 retailers (R. 121)

* The figure given is for GE television dealers. The figure for GE major appliance dealers is 54 and for dealers in GE radios and traffic appliances it is 463."

the public desiring to purchase an appliance and strolling down Mission Street for a span of but 11 blocks, of which appellant's store is approximately in the center, would pass the shops of 43 retailers, selling the [fol. 162] specific items and brands referred to in the complaint. Defendants' Exhibit A on the motion (R. 146) is a chart bringing together the factual data taken from the 12 affidavits. Since it strikingly exemplifies the fact, a copy is inserted on the preceding page.

Finally, it may be noted that while the alleged conspiracy is charged as having begun prior to 1952 (R. 9), the number of retail stores in San Francisco selling the items and brands referred to in the complaint steadily increased after 1952 and up to the time of the commencement of the suit. Admiral dealers increased from 150 to 195, and in the Mission District alone from 20 to 36; Zenith from 120 to 153; Whirlpool dealers from 40 to 47; Emerson from 40 to 109 and in the Mission District alone from 13 to 29; Philco from 79 to 175 and in the Mission District alone from 22 to 47; Wedgewood Stove dealers from 41 to 56 and from 8 to 9 in the Mission District alone; General Electric dealers and RCA have run into the hundreds for years and there have been no material variations. (This data appears in the 12 affidavits, R. 25 to 125)."

VI. The Law.

Apex Hosiery Co. v. *Leader, supra,* teaches that not every restriction on commerce is a restraint of trade within the meaning of the Sherman Act.

First, the restraint must "occur in or affect commerce between the states * * * for constitutional reasons." *Id.* at 498.

We need not concern ourselves here with the substantiality of the amount of commerce involved. *Apex* tells us "it is the nature of the restraint and its effect on interstate commerce, and not the amount of the commerce which are the tests of violation." *Id.* at 485.[25]

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[25] Citing *United States* v. *Socony-Vacuum Oil Co.*, 1940, 310 U.S. 150, 225. See also, *Times-Picayune Pub. Co.* v. *United States*, 1953,

Second, "the restraints at which the Sherman law is aimed, and which are described by its terms, *are only those* [fol. 163] *which are comparable to restraints deemed illegal at common law. . . .*" [Emphasis added.] *Id.* at 498. The drafters of the Sherman Act "extended the condemnation of the statute to restraints effected by any combination in the form of trust or otherwise, or conspiracy, as well as by contract or agreement, having those effects on the competitive system and on purchasers and consumers of goods or services which were characteristic of restraints deemed illegal at common law. . . ." *Ibid.*

In deciding the question of whether a conspiracy of workers to stop factory production was "the kind of restraint of trade or commerce at which the Act is aimed," [26] the Supreme Court in *Apex* had the same question (in different form) to answer as is here raised by the motion to dismiss. It is to be remembered that in *Apex* this question was required to be answered "even though a natural and probable consequence of their (the strikers') acts and the only effect on trade or commerce was to prevent substantial shipments interstate by the employer." [27]

> "The critical words which circumscribe the judicial performance of this function so far as the present case is concerned are 'Every . . . combination . . . or conspiracy in restraint of trade or commerce.' Since in the present case, as we have seen, the natural and predictable consequence of the strike was the restraint of interstate transportation *the precise question which we are called upon to decide is whether that restraint* resulting from the strike maintained to enforce union demands by compelling a shutdown of petitioner's factory *is the kind of 'restraint of trade or commerce' which the Act condemns.*" [28]

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343 U.S. 594, 611; *Lorain Journal Co.* v. *United States*, 1951, 342 U.S. 143, 151, n. 6; *United States* v. *Paramount Pictures*, 1948, 334 U.S. 131, 173; *United States* v. *Yellow Cab Co.*, 1947, 332 U.S. 218, 225-226.

[26] *Apex Hosiery* v. *Leader*, 1940, 310 U.S. 469, 487.

[27] *Ibid.*

[28] *Id.* at 490. (Emphasis added.)

The court then traces some of the background of the Sherman Act and states:

> "The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, [fol. 164] all of which had come to be regarded as a special form of public injury.[29]
>
> • • •
>
> For that reason the phrase 'restraint of trade' which, as will presently appear, had a well-understood meaning at common law, was made the means of defining the activities prohibited. The addition of the words 'or commerce among the several states' was not an additional kind of restraint to be prohibited by the Sherman Act but was the means used to relate the prohibited restraint of trade to interstate commerce for constitutional purposes, Atlantic Cleaners & Dyers v. United States, 286 U.S. 427, 434, so that Congress, through its commerce power, might suppress and penalize restraints on the competitive system which involved or affected interstate commerce."[30]

In *Apex* Justice Stone went on:

> "The common law doctrines relating to contracts and combinations in restraint of trade were well understood long before the enactment of the Sherman Law. They were contracts for the restriction or suppression of competition in the market, agreements to fix prices, divide marketing territories, apportion customers, restrict production and the like practices, which tend to raise prices or otherwise take from buyers or consumers the advantages which accrue to them from free competition in the market. . . .

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[29] *Id.* at 493.

[30] *Id.* at 494-495.

In seeking more effective protection of the public from the growing evils of restraints on the competitive system effected by the concentrated commercial power of 'trusts' and 'combinations' at the close of the nineteenth century, the legislators found ready at their hand the common law concept of illegal restraints of trade or commerce. In enacting the Sherman law they took over that concept by condemning such restraints wherever they occur in or affect commerce between the states. They extended the condemnation of the statute to restraints effected by any combination in the form [fol. 165] of trust or otherwise, or conspiracy, as well as by contract or agreement, having those effects on the competitive system and on purchasers and consumers of goods or services which were characteristic of restraints deemed illegal at common law, and they gave both private and public remedies for the injuries flowing from such restraints.

That such is the scope and effect of the Sherman Act was first judicially recognized and expounded in the classic opinion in *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, affirmed 175 U.S. 211, written by Judge, later Chief Justice, Taft, and concurred in by Justice Harlan and Judge, later Justice, Lurton, of this Court. This Court has since repeatedly recognized that the restraints at which the Sherman law is aimed, and which are described by its terms, are only those which are comparable to restraints deemed illegal at common law, although accomplished by means other than contract and which, for constitutional reasons, are confined to transactions in or which affect interstate commerce.

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In thus grounding the 'rule of reason' upon the analogy of the common law doctrines applicable to illegal restraints of trade the Court gave a content and meaning to the statute in harmony with its history and plainly indicated by its legislative purpose. Labor cases apart, which will presently be discussed, this Court has not departed from the conception of the Sherman Act as affording a remedy, public and private, for the public

wrongs which flow from restraints of trade in the common law sense of restriction or suppression of commercial competition. In the cases considered by this Court since the *Standard Oil* case in 1911 some form of restraint of commercial competition has been the sine qua non to the condemnation of contracts, combinations or conspiracies under the Sherman Act, and in general restraints upon competition have been condemned only when their purpose or effect was to raise or fix the market price. It is in this sense that it is said that the restraints, actual or intended, prohibited by the Sherman Act are only those which are so substantial as to affect market prices. Restraints on competition or on the course of trade in the merchandising [fol. 166] of articles moving in interstate commerce is (sic) not enough, unless the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition. (Citations omitted.)

* * *

Here it is plain that the combination or conspiracy did not have as its purpose restraint upon competition in the market for petitioner's product. Its object was to compel petitioner to accede to the union demands and an effect of it, in consequence of the strikers' tortious acts, was the prevention of the removal of petitioner's product for interstate shipment. So far as appears the delay of these shipments was not intended to have and had no effect on prices of hosiery in the market, and so was in that respect no more a restraint forbidden by the Sherman Act than the restriction upon competition and the course of trade held lawful in *Appalachian Coals v. United States, supra*, because notwithstanding its effect upon the marketing of the coal it nevertheless was not intended to and did not affect market price." [31]

Radovich v. *National Football League*, 9 Cir., 1956, 231 F.2d 621, was a pleading case. In it, this Court decided on

[31] *Id.* at 497-502.

two grounds that plaintiff's complaint did not state a cause of action. The first ground was that football was more like baseball (*Toolson* v. *New York Yankees*, 1953, 346 U.S. 356; *Federal Baseball of Baltimore* v. *National League*, 1922, 259 U.S. 200) than like boxing (*United States* v. *International Boxing Club*, 1955, 348 U.S. 236). Secondly, if wrong on the first premise, then Radovich's complaint did not "allege facts from which it can be determined as a matter of law that by reason of intent, tendency, or the inherent nature of the contemplated acts, the conspiracy was reasonably calculated to prejudice the public interest by unduly restricting the free flow of interstate commerce," quoting from *Fedderson Motors* v. *Ward*, 10 Cir., 1950, 180 F.2d 519, 522.

Radovich alleged that there was a conspiracy to eliminate football leagues not affiliated with the defendant, hence, [fol. 167] defendants were creating a monopoly. The method alleged was to control the players by the "reserve clause" and "black-lists." The alleged intent of the defendants in *Radovich* was to "boycott and ruin defendant's competitor, the All-America Conference." This Court concluded that the means alleged were not calculated to prejudice the public or unreasonably restrain interstate commerce. This Court failed "to discover any basis to say that the appellant has pleaded that All-America or any other league was ruined, would be ruined or substantially affected by the complained of acts," and therefore felt there were no facts pleaded leading to the conclusion that the public had been adversely affected.

The Supreme Court (352 U.S. 445) considered both grounds relied on by this Court to affirm the District Court and found them untenable. We are not concerned here with the Supreme Court's refusal to approve this Court's conclusion as to the similarity between football and baseball. But appellant herein strongly relies upon the pronouncement of the Supreme Court with respect to the second point: public injury. After disposing of the essential allegations of the substantial effect upon interstate commerce, the Supreme Court said:

> "We find the technical objections to the pleading without merit. The test as to sufficiency laid down by Mr. Jus-

> tice Holmes in *Hart* v. *B. F. Keith Vaudeville Exchange*, 262 U.S. 271, 274 (1923), is whether 'the claim is wholly frivolous.' While the complaint might have been more precise in its allegations concerning the purpose and effect of the conspiracy, 'we are not prepared to say that nothing can be extracted from this bill that falls under the Act of Congress . . .' Id., at 274." [32]

The Court then cites *United States* v. *Employing-Plasterers Association, supra,* which again is a pleading case.

The Supreme Court then states:

> "Petitioner's claim need only be 'tested under the Sherman Act's general prohibition on unreasonable restraints of trade,' *Times-Picayune Pub. Co.* v. *U.S.*, 345 U.S. 594, 614 (1953), and meet the requirement that [fol. 168] petitioner has thereby suffered injury. Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public 10/ and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. These laws protect the victims of the forbidden practices as well as the public." [33]

The Supreme Court, by Note 10 and reference to its earlier decision in *Apex*, defines what it means by "prohibited activities injurious to the public" and what the "forbidden practices" are from which the public is to be protected. Note 10 reads as follows:

> "In *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940), this Court said: 'The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of the purchasers or consumers of goods and services, *all of which had come to be regarded as a*

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[32] *Radovich* v. *National Football League*, 1957, 352 U.S. 445, 453.

[33] *Ibid.* 454.

special form of public injury,' (Emphasis supplied.) Id., at 493." [34]

To further emphasize the restriction to free competition to which it referred, the Supreme Court continued its Note 10 as follows:

"In *Standard Sanitary Mfg. Co.* v. *United States*, 226 U.S. 20 (1912), speaking of the antitrust laws the Court said: '*The law is its own measure of right and wrong,* of what it permits, or forbids, and *the judgment of the courts cannot be set up against it* in a supposed accommodation of its policy with the good intention of parties, and it may be, of some good results.' (Emphasis supplied.) Id., at 49." [35]

We take it that by this Note the Supreme Court admonishes the inferior courts not to come to their own philosophical conclusions as to what restraints of trade should be [fol. 169] prohibited, contrary to the language of a statute which was constituted and adopted with recognition of the existing rules of common law. We cannot say what we may think it should be because of personal antitrust philosophy or predilection.

Times-Picayune Pub. Co. v. *United States*, 1953, 345 U.S. 594, is cited in *Radovich*, 352 U.S. at 453, as setting up the tests by which any wholly non-frivolous claim of a plaintiff is to be tested.

In *Times-Picayune* the District Court had denied the government's motion for summary judgment which had urged that "the unit contracts" therein under attack were per se violations of §1 of the Sherman Act. But after trial the District Court found that the defendants had instituted the unit contract system "in order to 'restrain general and classified advertisers from making an untrammeled choice' "

[34] It is to be noted that the emphasis supplied in the foregoing quotation by the Supreme Court of its earlier decisions in *Apex*, was supplied by that Court, not by this Court.

[35] The three-judge dissent in *Radovich* is of no materiality here, because it is based upon the appropriate compulsions of *stare decisis*, and the binding effect of the *Toolson* case.

between two competing papers " 'in purchasing advertising space, and also to substantially diminish the competitive vigor of' " the opposing paper, and that this unit system was "economically enforceable against (advertising) buyers solely because of the Times-Picayune's 'dominant' or 'monopoly position.' " [36]

The Supreme Court, reviewing these findings, then related how the District Court had held §1 of the Sherman Act violated; that "tying arrangements" depended upon the market setting; and, that in the market setting found by the Supreme Court, "we do not think that the Times-Picayune occupied a 'dominant' position in the newspaper advertising market in New Orleans." [37] It was therefore necessary for the Supreme Court to test the advertising contracts under attack.

". . . .under the Sherman Act's general prohibition on unreasonable restraints of trade. For purposes of §1, '[a] restraint may be unreasonable either because a restraint otherwise reasonable is accompanied with a specific intent to accomplish a forbidden restraint or because it falls within the class of restraints that are illegal per se.' *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 522 (1948). Since the requisite intent is [fol. 170] inferred whenever unlawful effects are found, *United States* v. *Griffith*, 334 U.S. 100, 105, 108 (1948); *United States* v. *Patten*, 226 U.S. 525, 543 (1913), and the rule of *International Salt* is out of the way, the contracts may yet be banned by §1 if unreasonable restraint was either their object or effect. . . . For our inquiry to determine reasonableness under §1 must focus on 'the percentage of business controlled, the strength of the remaining competition [and] whether the action springs from business requirements or purpose to monopolize.' 334 U.S., at 527; compare *Standard Oil Co. of California* v. *United States*, 337 U.S. 293, 312-313 (1949)." [38]

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[36] *Times-Picayune* v. *United States*, 1953, 345 U.S. 594, 601.

[37] *Id.* at 611.

[38] *Id.* at 614-615.

Mr. Justice Clark then treats the factual situation disclosed by the evidence, finds the advertising contracts were the results of endeavors to "rationalize" operations; were legitimate business aims; were not conceived to achieve monopolistic ends; were at least partially induced by competitive business considerations and "did not bespeak a purposive quest for monopoly or restraint of trade."[39]

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[39] *Id.* at 623.

"Consequently, no Sherman Act violation has occurred unless the Publishing Company's refusal to sell advertising space except en bloc, viewed alone, constitutes a violation of the Act. Refusals to sell, without more, do not violate the law. Though group boycotts, or concerted refusals to deal, clearly run afoul of §1, *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U.S. 211, 214 (1951); *Associated Press* v. *United States*, 326 U.S. 1, 7 (1945); see *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 522 (1948), different criteria have long applied to qualify the rights of an individual seller. Beginning with *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919), this Court's decisions have recognized individual refusals to sell as a general right, though 'neither absolute nor exempt from regulation.' *Lorain Journal* v. *United States*, 342 U.S. 143, 155 (1951). If accompanied by unlawful conduct or agreement, or conceived in monopolistic purpose or market control, even individual sellers' refusals to deal have transgressed the Act. *Lorain Journal* v. *United States, supra; United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 708, 721-723 (1944); *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U.S. 359, 375 (1927); *United States* v. *Schrader's Son, Inc.*, 252 U.S. 85, 99 (1920); cf. *American Tobacco Co.* v. *United States*, 328 U.S. 781, 808 (1946); *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441, 453-455 (1922). Still, although much hedged about by later cases, *Colgate's* principle protects the Times-Picayune Publishing Company's simple refusal to sell advertising space in the Times-Picayune or States separately unless other factors destroy the limited dispensation which that case confers.

In our view, however, no additional circumstances bring this case within §1. . . . With the advertising contracts in this proceeding viewed as in themselves lawful and no further elements of combinations apparent in the case, §2 criteria must become dispositive here.

An insufficient showing of specific intent vitiates this part of the Government's case. While the completed offense of monopolization under §2 demands only a general intent to do the act, 'for no monopolist monopolizes unconscious of what he is doing,' a specific intent to destroy competition or build monopoly is essential to guilt for the mere attempt now charged. *United States* v. *Aluminum*

[fol. 171] This case, to us, holds that "restraints of trade," as that language is used in the Sherman Act means "unreasonable" restraints of trade, and "unreasonable restraints of trade" are (1) illegal per se restraints interfering with free competition in business and commercial transactions which tend to (a) restrict production; (b) affect prices; or, (c) otherwise control the market to the detriment of the purchasers or consumers of goods and services, or (2) those restraints of trade, ordinarily reasonable, but made unreasonable because accompanied with a specific intent to accomplish the equivalent of a forbidden restraint.

Applying these tests to the instant facts we must ask:

(1) What is *the restraint* relied upon?

(2) Is the restraint *illegal per se?*

[fol. 172] (3) If not, (*i.e.*, if an otherwise reasonable restraint) is it accompanied with *a specific intent to accomplish a forbidden restraint?*

(4) Was the *object* of the contract or combination under attack an *unreasonable restraint?*

(5) Was the *effect* of the contract under dispute an *unreasonable restraint?*

Times-Picayune further suggests, that in determining what constitutes an "*unreasonable restraint*" (either sought

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Co. of America, 148 F.2d 416, 431-432 (1945); *United States* v. *Griffith*, 334 U.S. 100, 105 (1948); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 814 (1946); *Swift & Co.* v. *United States*, 196 U.S. 375, 396 (1905). This case does not demonstrate an attempt by a monopolist established in one area to nose into a second market, so that past monopolistic success both enhances the probability of future harm and supplies a motivation for further forays. *Cf. United States* v. *Griffith*, *supra*; *Swift & Co.* v. *United States*, *supra*. *And unlike Lorain Journal* v. *United States*, 342 U.S. 143 (1951), where a single newspaper's refusal to sell space to advertisers unless they forewent advertising over a competing local radio station manifested 'bold, relentless, and predatory commercial behavior,' *id.*, at 149, no remotely comparable charge is borne out here. • • •

We conclude, therefore, that this record does not establish the charged violations of §1 and §2 of the Sherman Act." *Id.* at 624-627.

by or resulting from defendants' acts), we must determine (a) the percentage of business controlled; (b) the strength of the remaining competition; (c) whether the action criticized was the result of business requirements or done with a purpose to monopolize.

Here the restraint relied on, as we see from the complaint,[40] was in preventing plaintiff from obtaining *certain* electrical appliances for resale, while at the same time permitting Broadway-Hale to purchase those *certain* electrical appliances. This is a simple refusal to sell, allegedly by joint action. Various other competing electrical appliances were shown by the record before the trial court to be available to Klor's, Inc.[41] Many other retailers sold these "certain electrical appliances" to the public, fifty-three in the Mission District of San Francisco alone. The number of retailers in San Francisco from the start of the alleged conspiracy to the time of filing suit increased.

There was no charge or proof that by any act of defendants the price, quantity, or quality offered the public was affected, nor that there was any intent or purpose to effect a change in, or an influence on, prices, quantity, or quality, either directly or indirectly. It is not suggested that either the object or effect of the alleged conspiracy was to create an unreasonable restraint, illegal per se.

[fol. 173] If a business transaction and the effect and object of such transaction between two or more persons is lawful, then the transaction cannot be nor can it create an unlawful conspiracy. If "X Company," a manufacturer, refuses to sell to Klor's, Inc., and sells to "Y Company," a retailer who also agrees to buy from "X" as long as "X" does not sell to Klors, more than one person is involved, and they have agreed not to sell, but their act is not neces-

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[40] Tr. p. 8, para. III.

[41] Twenty competing brands of television sets compared to the seven declared impossible to attain; eighteen competing brands of refrigerators, compared to three; twenty-three stoves, compared to five; thirty competing clothes washers and dryers, compared to two. See Statement of Facts, *supra*.

sarily[41a] illegal. To a minute degree, any refusal to sell is a restraint of trade, in the ordinary sense; but it is not necessarily a restraint in the Sherman Act sense. Some restraints of trade are reasonable, and hence not violative. Others are not in, nor do they affect, interstate commerce, and hence are not violative. Others are so remote in their effect on the public at large as not to be restraints for Sherman Act purposes. *Apex Hosiery* v. *Leader, supra; Eastern States Lumber Dealers Association* v. *United States*, 1914, 234 U.S. 600; *Miller Motors* v. *Ford Motor Co.*, 4 Cir., Jan. 20, 1958, ... F.2d ....., affirming, 149 F.Supp. 790 (1957); *Hudson Sales Corp.* v. *Waldrip*, 5 Cir., 1954, 211 F.2d 268; *Fedderson Motors* v. *Ward, supra; Westmoreland Asbestos Co.* v. *Johns-Manville Corp.*, 2 Cir., 1943, 136 F.2d 844.

The purpose of the antitrust statutes is to protect the "public" from the harm which follows from concerted or monopolistic conduct designed to acquire control of a market, usually competitive, to which the public must ultimately resort and which conduct can be described as an undue restraint of trade.[42] Notwithstanding the many phrases which may be picked at random out of numerous cases, and, out of context, be made to support the position that concerted conduct directed at harming the opportunity of a single trader to compete is always within the prohibitions of the Sherman Act, it is our opinion that there exists the [fol. 174] need to show facts in a motion such as this from which a court might reasonably infer "public injury" before an antitrust violation is before the court; and, further, that the Supreme Court has not departed one whit from this requirement.

Where the particular conduct in restraint of trade is of the kind prohibited by the Act and where the inference of

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[41a] See the "simple example" suggested by Mr. Justice Black in *Northern Pacific Railway Co.* v. *United States, supra*, at 653:

> "[I]f one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself."

[42] *Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 1915, 236 U.S. 165, 174; *Eastern States Lumber Dealers Ass'n* v. *United States*, 1913, 234 U.S. 600.

public injury reasonably can be extracted from the complaint, a good cause of action is stated. Assuming these conditions are met, a private plaintiff has the right to bring an action for treble damages for injury to his business or property "by reason of anything forbidden in the antitrust laws (Title 15, U.S.C. §15) and for an injunction." (Title 15, U.S.C. §26.) However, the private right is not a remedy for a private wrong created by federal law. The private right is a method of enforcing public rights and thereby providing additional means of enforcing the prohibitions of the statute. "Congress . . . has provided sanctions allowing private enforcement of antitrust laws by an aggrieved party." (*Radovich* v. *National Football League, supra* at 454.) In this way it is entirely accurate to assert that "these laws protect the victim of the forbidden practice as well as the public." (*Ibid.*) But the private right is a purely incidental means of enforcing the Act. Before there can be any "forbidden practices" there must be an improper restraint of trade or commerce; once this is established or reasonably put in issue, the private right and the consequent private protection arise. Without the prohibited restraint, there is no private right for there has been no violation, *i.e.*, there has been no conduct of defendants, which is or conceivably could be injurious to the public welfare. Plaintiff must allege (and here prove) that there has been a prohibited restraint and that he has been proximately damaged thereby in order to sustain his complaint or position against a motion to dismiss or for summary judgment. He need not allege, additionally, that the public has been injured by defendants' conduct. But to have the prohibited restraint there must be facts from which it can be determined that the "conduct charged . . . was reasonably calculated to prejudice the public interest by unduly restricting the free flow of commerce." (*Kinnear-Weed Corp.* v. *Humble Oil & Refining Co.*, 5 Cir., 1954, 214 F.2d 891.) The Supreme Court in *Radovich*, relied on so heavily by plaintiff, said no more than this in quoting [fol. 175] Justice Holmes' conclusion in *Hart* v. *B. F. Keith Vaudeville Exchange*, 1923, 262 U.S. 271, 274:

> "It is enough (for purposes of motion to dismiss) that we are not prepared to say that nothing can be

extracted from this bill that falls under the Act of Congress, or at least that the claim is wholly frivolous."

Turning now to the cases cited to us by plaintiff, we are unable to discern any deviation from what we have just stated. Plaintiff asserts that the case of *Shotkin* v. *General Electric Co.*, 10 Cir., 1948, 171 F.2d 236, established a new requirement for private antitrust litigation: that plaintiff is required to allege injury to the public in order to state a cause of action. We are unable to find any such requirement in *Shotkin*. In affirming the granting of a motion to dismiss, Judge Bratton, speaking for the Court, said:

"Founded upon these broad concepts of public policy, the Act is limited in operative scope and effect to combinations, agreements, or concerts which tend to prejudice the public interest by unduly restricting competition or unduly obstructing the due course of trade, or which because of their evident purpose or inherent nature injuriously restrain trade in the competitive markets.

* * *

It is essential to recovery in an action of this kind that plaintiff allege and prove two things: a violation of the Act, and damages to plaintiff proximately resulting from the acts and conduct of the defendants which constitute the violation of the Act. Injury to the plaintiff, of itself and alone, is not sufficient to warrant a civil action of this nature for injunctive relief and damages. There must be harm to the general public in the form of undue restriction of trade and commerce as a result of the wrongful contract, combination, or concert.

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In other words the complaint failed to allege facts from which it could be determined as a matter of law that a combination or conspiracy was entered into which brought about an increase in prices to the consuming public, a diminution in the volume of merchan- [fol. 176] dise in the competitive markets, a deteriora-

> tion in the quality of merchandise available in the channels of commerce, or other like evil consequence in the free flow of interstate commerce." [43]

We are unable to discern any new doctrine in the above extract. It seems to be no more than a concise and accurate statement of well-established requirements for private recovery under the antitrust provisions.

It is true that on a motion for dismissal the complaint is to be broadly interpreted in a manner most favorable to the pleader;[44] but that does not mean that the court must find allegations of ultimate facts in conclusionary pleading, or a violation of the Sherman Act from allegations of action directed solely at plaintiff and which, as such, could have as a matter of law no conceivable effect on the competitive market.

Similarly with *Fedderson Motors* v. *Ward, supra*, which plaintiff argues continued the "new requirement" of public injury supposedly injected by *Shotkin*. *Fedderson* also is a case where, on affirming a judgment dismissing the complaint, the court was unable to find any allegation of material fact evidencing an antitrust violation.

The Supreme Court in *Radovich* v. *National Football League, supra*, termed controlling of this case by plaintiff, did not, in our opinion, in any way overrule these cases. The Court in *Radovich* did no more than to re-assert Justice Holmes' admonition that the test of sufficiency of the complaint is whether "the claim is wholly frivolous." (*Id.* at 453.) In reversing this Court the Supreme Court determined that the allegation of defendants' attempt to eliminate from competition the All-America Conference, defendants' *only* competitor in professional football, which thereby caused injury to the plaintiff in his business or property, was sufficient to sustain the complaint against a motion to dismiss for failure to state a cause of action under the antitrust laws. Read thus, the *Radovich* case [fol. 177] is entirely consistent with *Shotkin, Fedderson,*

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[43] 171 F.2d, at 238-239.

[44] *Radovich* v. *National Football League, supra; William Goldman Theatre's, Inc.* v. *Twentieth Century Fox*, E.D.Pa., 1957, 151 F.Supp. 840.

and all other cases in which the Supreme Court and the lower federal courts have adhered to the requirement that a violation of the Sherman Act requires conduct of defendants by which the public is or conceivably may be ultimately injured.[15]

Plaintiff cites us many cases involving group boycotts, discrimination, and the use of large scale buying power to drive out a competitor. And he supplies us with many quotations which at first blush appear to support his position. But each of his authorities involves factual situations entirely different from the one before us; factual situations in which the random phrases picked by plaintiff are proper and not inaccurate; they do not, however, support the contentions made here.

We are told that the antitrust laws are a trader's statute and cited to *Mandeville Farms* v. *Sugar Co.*, 1948, 334 U.S. 219; but that case holds that the antitrust statute "does not confine its protection to purchasers, to competitors or to sellers." (*Id.* at 236.) The statute, so *Mandeville Farms* decides, includes protection against the anti-competitive conduct of *buyers* also. But the reason for such protection, is as always, fear of the detrimental effect on the public which these practices may have. In holding that concerted action by processors directed against growers is barred by the antitrust laws, the Court did not intend such a phrase as protection of "all who are made victims of the forbidden practices" (*Id.* at 236) to be used to create a cause of action for a single competitor injured by action directed solely at him which has no substantial effect on competition. Where there is no conceivable way in which a substantial segment of the public can be injured by the conduct attached, the Sherman Act is not violated. (*Apex Hosiery* v. *Leader*, *supra.*) The *Mandeville Farms* case is in no way contrary. It is not authority for the proposition that conduct directed solely and exclusively at an individual competitor

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[15] See *Mandeville Farms* v. *Sugar Co.*, 1948, 334 U.S. 219; *Apex Hosiery* v. *Leader*, *supra*, Report of the Attorney General's National Committee to Study the Antitrust Laws 12 (1955).

is illegal, unless the result is a substantial lessening of competition in the particular market involved.[46]

[fol. 178] In each of the "Theatre" cases relied on by plaintiff, defendants' conduct either did or was intended to eliminate the sole competitor in a particular market, was directed at one of a very small number of competitors,[47] or involved the use of large scale monopolistic power derived from nationwide enterprises to eliminate a competitor and thereby substantially affect competition in the local market area. (See, *e.g.*, *United States* v. *Schine Chain Theatres*, 1948, 334 U.S. 110; *United States* v. *Griffith*, 1948, 334 U.S. 100; *Bigelow* v. *RKO Radio Pictures*, 1946, 327 U.S. 251; *Binderup* v. *Pathe Exchange*, 1923, 263 U.S. 291; *Hart* v. *B. F. Keith Vaudeville Exchange, supra; Paramount Film Distributing Corp.* v. *Village Theatre*, 10 Cir., 1955, 228 F.2d 271; *William Goldman Theatres* v. *Loew's, Inc.*, 3 Cir., 1945, 150 F.2d 738; *White Bear Theatre Corp.* v. *State Theatre Corp.*, 8 Cir., 1942, 129 F.2d 600; *Victor Talking Machine* v. *Kemeny*, 3 Cir., 1921, 271 F. 810.

Finally to be considered are those cases cited to us in which price fixing or some other form of complete market control was involved and where defendants' conduct was directed at a particular class of persons of which plaintiff was one. Here again it is clear that control or attempted control of all competitors is the evil which causes the contracts, combinations, or conspiracies to be the type prohibited by §1 of the statute. These cases are not here applicable; the conduct involved either was intended to control the entire market and was directed at plaintiff because he refused to conform or was directed at an entire class of defendants' competitors, buyers, or sellers, one of whom was the plaintiff. (See, *e.g.*, *Radovich* v. *National Football League, supra; Kiefer-Steward* v. *Seagram & Sons*, 1951, 340 U.S. 211; *International Salt Co.* v. *United States*, 1947, 332 U.S. 392; *Fashion Guild* v. *FTC*, 1941, 312 U.S. 457; *Flintkote* v. *Lysfjord*, 9 Cir., 1957, 246 F.2d 368; *United*

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[46] See *International Salt Co.* v. *United States*, 1947, 332 U.S. 392, 396.

[47] Removal of any one competitor thereby having a substantial effect on competition.

States v. *Tarpon Springs Sponge Exchange*, 5 Cir., 1944, 142 F.2d 125; *Package Closure Corp.* v. *Sealright Co.*, 2 Cir., 1944, 141 F.2d 972; *Roseland* v. *Phister*, 7 Cir., 1942, 125 F.2d 417; *Johnson* v. *J. H. Yost Lumber Co.*, 8 Cir., 1941, 117 F.2d 53.) Not one of the out of context quotations [fol. 179] from the foregoing cases used by plaintiff will support his position when read within its factual setting.

Count one of the complaint, with which we are here solely concerned, alleges, in paragraph six, that defendant Broadway-Hale, in combination with each of the manufacturing-distributing defendants, prevented *plaintiff* from obtaining products to sell to the public. There is no allegation of actual, attempted, or intended control of the market in which plaintiff and defendant Broadway-Hale competed, considering the market to be either the retail sellers of the Mission District of San Francisco, the city itself, or the purchasing public. Defendants' affidavits, submitted under the provisions of Rule 56 of the Federal Rules, as well as the facts of which this Court may take judicial notice leave no doubt that the conduct directed at this particular plaintiff and only at this plaintiff did not and could not have under the circumstances any substantial effect on market competition. As defendants point out there are literally hundreds of dealers in the San Francisco Bay Area dealing in the same kinds and brands of major appliances as plaintiff and defendant Broadway-Hale. On Mission Street, along with the plaintiff and Broadway-Hale, there are over forty retail dealers. Additionally, there are numerous brands of appliances to which plaintiff was not denied access and which compete favorably with those he was denied.[48] In light of our previous discussion, such allegations, especially when considered on motion for summary judgment rather than on motion for dismissal of the complaint, do not allege facts from which it can be inferred that there was or may be a substantial effect on competition, and therefore do not allege a violation of §1 of the antitrust laws—

[48] See the Supreme Court's discussion of the effect of competing alternatives on alleged antitrust violations in *Times-Picayune* v. *United States, supra.*

they do not state facts from which injury to the public can be perceived.

The first sentence of paragraph six of count one of plaintiff's complaint is of no assistance to appellant. It alleges only that "defendants . . . have restrained trade and commerce . . . by contracting, combining, and conspiring together . . . in restraint and monopoly of such trade and commerce . . . and have thereby substantially lessened, limited and restrained competition in said trade and com- [fol. 180] merce. . . ." This is no more than the pleader's conclusion that defendants have restrained trade and commerce by restraining trade and commerce. It states no facts from which illegal action can be perceived or inferred. Paragraph eight of count one speaks of Broadway-Hale's "monopolistic buying power" enjoyed "by reason of the large number of retail outlets it operates." But the essence of this allegation is that Broadway-Hale "has purchased and continues to purchase the products of the manufacturer-distributor defendants upon the condition that the manufacturer-distributor defendants do not sell their products to the plaintiff." We find no basis for determining that Broadway-Hale intended, or had the power if it so intended, to effect such conditions on its purchases in such scope as to appreciably affect competition among retailers generally in their purchases or sales to the public. It is well known that appliance sales are within a most highly competitive market. As between two dealers, one may be able to condition his purchases by requiring no sales to the other. So long as the ability to so condition one's own purchases does not substantially interfere with either the "retailing public" or the "consuming public," there is no conduct which violates the provisions of the antitrust laws.

In determining whether certain conduct was "in restraint of trade or commerce," we re-emphasize what was said by the Court in *Apex Hosiery* v. *Leader, supra,* at 493, 500:

> "The end sought (by the Sherman Act) was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or *otherwise* control the market to the detriment of purchasers or consumers of goods

> and services, all of which had come to be regarded as a special form of public injury. * * *
>
> . . . [R]estraints, actual or intended, prohibited by the Sherman Act are only those which are so substantial as to affect market prices. Restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce is (sic) not enough, unless the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition." [Emphasis added.]

[fol. 181] In other words, restraints, in order to be violative of the law, must operate, or be intended to operate, to restrict commercial competition in a *substantial* manner.

We believe this to be an accurate and controlling statement of the law applicable in determining whether particular conduct conceded to exist does or does not constitute a violation of the antitrust laws. Neither *Shotkin* v. *General Electric Co., supra*, and *Fedderson Motors* v. *Ward, supra*; nor the cases which follow and rely on them are to the contrary; nor does *Radovich* v. *National Football League, supra*, weaken or limit the conclusions derived from the *Apex* case.

We hold, therefore, that plaintiff's first cause of action, as proved, is fatally defective. The facts prove no more than a squabble between two of many competitors in a highly competitive market area. The facts prove no conduct in violation of the antitrust laws because there has been no conduct by which the "public" could conceivably suffer injury. Construing the complaint and affidavits together, and considering the facts judicially known to this Court and the court below, the motion for summary judgment was properly granted.

The judgment is *affirmed*.

[File endorsement omitted]

[fol. 182]

IN UNITED STATES COURT OF APPEALS FOR NINTH CIRCUIT

No. 15380

KLOR'S, INC., Appellant,

v.

BROADWAY-HALE STORES, INC., et al., Appellees.

JUDGMENT—Filed and entered March 28, 1958

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted:

On Consideration Whereof, It is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and hereby is affirmed.

[File endorsement omitted]

[fol. 183]

Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 184]

SUPREME COURT OF THE UNITED STATES

No. 76, October Term, 1958

KLOR'S, INC., Petitioner,

v.

BROADWAY-HALE STORES, INC., ADMIRAL CORPORATION, ADMIRAL DISTRIBUTORS, INC., et al.

ORDER ALLOWING CERTIORARI—October 13, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U.S.
FILED
MAY 31 1958
JOHN T. FEY, Clerk

In the Supreme Court

OF THE

United States

OCTOBER TERM, [redacted] 1958

No. [redacted] 76

KLOR'S, INC., *Petitioner,*

vs.

BROADWAY-HALE STORES, INC., ADMIRAL CORPORATION, ADMIRAL DISTRIBUTORS, INC., ZENITH RADIO CORPORATION, ZENITH RADIO AND DISTRIBUTING CORPORATION, WHIRLPOOL SEEGER CORPORATION, H. R. BASFORD COMPANY, RADIO CORPORATION OF AMERICA, LEO J. MEYBERG COMPANY, EMERSON RADIO AND PHONOGRAPH CORPORATION, JEFFERSON-TRAVIS, INC., PHILCO CORPORATION, PHILCO DISTRIBUTORS, INC., DALLMAN SUPPLY COMPANY, RHEEM MANUFACTURING COMPANY, GENERAL ELECTRIC COMPANY, GENERAL ELECTRIC DISTRIBUTING CORPORATION, OLYMPIC RADIO AND TELEVISION, INC., OLYMPIC TELEVISION OF NORTHERN CALIFORNIA, TAPPAN STOVE COMPANY, O'KEEFE & MERRITT COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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I.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1957

No.

KLOR'S, INC., *Petitioner,*

vs.

BROADWAY-HALE STORES, INC., ADMIRAL CORPORATION, ADMIRAL DISTRIBUTORS, INC., ZENITH RADIO CORPORATION, ZENITH RADIO AND DISTRIBUTING CORPORATION, WHIRLPOOL SEEGER CORPORATION, H. R. BASFORD COMPANY, RADIO CORPORATION OF AMERICA, LEO J. MEYBERG COMPANY, EMERSON RADIO AND PHONOGRAPH CORPORATION, JEFFERSON-TRAVIS, INC., PHILCO CORPORATION, PHILCO DISTRIBUTORS, INC., DALLMAN SUPPLY COMPANY, RHEEM MANUFACTURING COMPANY, GENERAL ELECTRIC COMPANY, GENERAL ELECTRIC DISTRIBUTING CORPORATION, OLYMPIC RADIO AND TELEVISION, INC., OLYMPIC TELEVISION OF NORTHERN CALIFORNIA, TAPPAN STOVE COMPANY, O'KEEFE & MERRITT COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of

Appeals for the Ninth Circuit entered in the above entitled case on March 28, 1958.

CITATIONS TO OPINIONS BELOW.

The order of the trial court is unreported and appears at Tr. 133-134. The opinion of the United States Court of Appeals for the Ninth Circuit is as yet unreported and appears attached hereto as Appendix A. The opinion of the trial court appears at page 8 of said opinion.

JURISDICTION.

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on May 28, 1958 (R. 182, Appendix B). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED.

1. Whether Section 4 of the Clayton Act affords the federal courts jurisdiction to protect single traders from forbidden conduct of the type condemned in the Sherman Act which is in or affects the free flow of commodities in interstate trade and commerce; or whether the federal courts are allowed to dismiss bona fide complaints under summary judgment procedure on the ground that the antitrust laws only protect the public at large and do not afford federal jurisdiction to the protection of a single trader.

STATUTES INVOLVED.

The statutory provisions are Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2 and Section 4 of the Clayton Act, 15 U.S.C. Section 15. These are printed and attached hereto as Appendix C. In addition, Rule 56, Summary Judgment, is printed and attached hereto in Appendix C.

STATEMENT OF THE CASE.

Petitioner's complaint was filed on February 23, 1956. (Tr. 3-15.) It originally contained charges of violations of the Robison-Patman Act as well as the Sherman Act. By pre-trial order the complaint as to violation of the Sherman Act was separated from charges of violations of the Robinson-Patman Act, and the proceedings thereafter below and on appeal were concerned only with the complaint as printed in the record. (Tr. 20, 19.) The complaint alleges that ten manufacturers of radio, television sets, gas stoves and refrigerators and other white goods, Radio Corporation of America, General Electric Company, Zenith Radio Corporation, Philco Corporation, Emerson Radio and Phonograph Corporation, Rheem Manufacturing Company, Whirlpool Seeger Corporation, Admiral Corporation, Olympic Radio and Television, Inc., and Tappan Stove Company, and their affiliated distributors, conspired to discriminate and to boycott plaintiff at the favor of the plaintiff's competitor, Broadway-Hale Stores (Complaint, Pr. 6, 7, 8, Tr. 9-12.) The complaint alleges that the petitioner is

the owner and operator of a large retail store located on Mission Street, San Francisco, California, engaged in the business of selling household appliances to the consumer. (Id., p. 5.) It is alleged that petitioner is capable of handling a large volume of all lines of household appliances. (Id.) The defendant Broadway-Hale Stores, Inc. operates a chain of stores in the western area of the United States and sells the same type of merchandise as that sold by plaintiff. It operates a store located next door to plaintiff's store on Mission Street.

The complaint alleges that the respondents are in or affect interstate trade and commerce (Id., Pr. 2.) Said allegations were not denied by respondents in summary judgment affidavits.

The complaint charges that Broadway-Hale has used its chain buying power to cause these interstate manufacturers to enter into a conspiracy with it with the purpose and object of discriminating against petitioner and to cause the refusal of these manufacturers to sell all or most of their goods, to petitioner. (Complaint, Pr. 6, 8, Tr. 8-11, 12.) The conspiracy, it is alleged, allows Broadway-Hale a monopolistic position in the retail selling of household appliances. (Complaint, Pr. 8, Tr. 11-12.)

The complaint, then, may be summarized as involving the following: (1) a conspiracy composed of ten interstate manufacturers, their distributors and Broadway-Hale to discriminate against the petitioner as to those products sold it in prices, advertising allowances, demonstration techniques, and other terms

and conditions connected with the sale and distribution of the products manufactured and sold by the respondents. (Complaint, Pr. 6, Tr. 9-11.)

(2) a conspiracy composed of the same parties to refuse to sell their products to petitioner, a group refusal to deal.

(3) an attempt by these parties to allow Broadway-Hale a monopolistic position in the sale of their products.

(4) an intent by Broadway-Hale to use its chain buying power to monopolize the sale of these parties' products and injure and harm the petitioner.

Before answers were filed, the respondents moved the trial court to dismiss petitioner's complaint and for summary judgment. (Tr. 22, 128, 130.) The motion for dismissal of the complaint was deferred and the judgment entered by the trial court was filed after the granting of the motion for summary judgment. (Tr. 16, 17, 133-137.)

As against the positive averments of petitioner's complaint alleging conspiracies to discriminate and boycott, the use of monopolistic chain buying power and the oppression of a trader, the respondents on summary judgment supported their motion by telephone books and lists of accounts to which merchandise was sold. They were directed solely to the proposition that the existence of a "public injury" was a jurisdictional requirement under Section 4 of the Clayton Act. They did not direct themselves to the jurisdictional requirements of "interstate commerce".

As against the positive averments of the use of chain buying power, monopolistic design and intention to injure and harm petitioner, respondent Broadway-Hale filed an affidavit showing that there was other merchandise available to the petitioner aside from the merchandise manufactured and sold by its alleged co-conspirators. (Tr. 25-26.) It supported its position by attaching pages from the telephone books. It did not deny any of the allegations of the petitioner's complaint, nor aver that it could have successfully operated without the products denied petitioner.

The affidavits of the managers of the respondent manufacturers and distributors were of a similar cast. These affidavits contained no statement controverting the allegations of conspiracy and monopolization. Rather they showed that the respondents did not sell their merchandise to petitioner (Admiral, Tr. 45-47; Zenith, Tr. 48-50; Whirlpool, Tr. 50-52; RCA, Tr. 52-54 (and see telephone book, Tr. 30); Emerson, Tr. 54-57; Philco, Tr. 58-62; Wedgewood Stoves, Tr. 62-66; General Electric, Tr. 66-116; Olympic, Tr. 116-117; O'Keefe & Merritt Company, Tr. 121-124).

The courts below were thus faced with affidavits showing the existence of a bona fide group refusal to sell, operating in the channels of interstate commerce. Petitioner, although admittedly operating a large retail store, "at least comparable to the stores operated by Hale in plaintiff's competitive area" (R. 11) was not able to obtain the following merchandise, as admitted by the respondents: Admiral radios, televisions, refrigerators and electric ranges; Zenith radio

and television sets; Whirlpool clothes washers and dryers; RCA radio and television sets; Emerson radio and television sets; Philco radio and television sets and refrigerators; Wedgewood stoves; General Electric electric ranges, clothes washers and dryers, General Electric Television sets and radios; Olympic radio and television sets; Tappan stoves; O'Keefe & Merritt products.

The real issue before the court below was whether the positive averments of the petitioner's complaint had been controverted by affidavits disclosing the existence of the lack of substantial controversy between the parties. Rule 56, Federal Rules of Civil Procedure. Yet, despite the refusal of the respondents to deny the positive allegations of petitioner's complaint, and the disclosure of a prima facie group refusal to deal in summary judgment affidavits the District Court concluded that it had no jurisdiction over the subject matter. (Tr. 133-134.) It said that the antitrust laws are concerned only with public wrongs and not with the victimization of a single trader. It did not search the complaint for violations of the antitrust laws; it did not determine whether or not the affidavits were sufficient to controvert the allegations of violations of the antitrust laws; it surmised the existence of a personal squabble and declined to exercise jurisdiction. Yet, it is admitted in the opinion of the Ninth Circuit that "We need not concern ourselves with the substantiality of the amount of commerce involved". (Opinion, p. 13.)

Between the filing of the judgment of the trial court on September 25, 1956 (Tr. 136) and the filing of the opinion by the Ninth Circuit on March 28, 1958, this Court had decided the case of *Radovich v. National Football League, et al.*, 352 U.S. 445, 77 S. Ct. 390.

The Ninth Circuit affirmed the judgment of the lower Court holding that the affidavits of the respondents had demonstrated that the Federal Court had no jurisdiction of the subject matter. It concluded the following: (1) The antitrust laws do not condemn the entry into conspiracies by otherwise competitive corporations affecting interstate commerce to the injury of a single trader, and do not condemn the plans of a chain buying corporation to harm and injure his competitor; (2) the antitrust laws were designed to protect only the public at large and the public is not entitled to the competition of all traders in a market free of predatory conduct otherwise condemned by the antitrust laws if applicable to an entire class; (3) the existence of a conspiracy in per se restraint of trade, a conspiracy to boycott, may be controverted on summary judgment by showing that the conspirators did not ruin all or a substantial amount of competition; (4) the doctrine of per se violation of the antitrust laws permits or allows the Courts to consider the economic effect of the conduct per se forbidden by the antitrust laws on the public at large; (5) in a summary judgment setting, the Court may construe plaintiff's complaint against him and restrict inferences from the complaint. Thus the Court failed

to view petitioner's complaint as involving a group refusal to deal or as involving predatory monopolistic conduct by the owner of a chain of retail stores doing business in interstate channels.

REASONS FOR GRANTING THE WRIT.

I.

THE DECISION OF THE COURT BELOW IS IN TOTAL CONFLICT WITH THE DECISIONS OF THIS COURT WHICH HAVE (1) REJECTED THE PRINCIPLE THAT A VIOLATION OF A PUBLIC STATUTE IS SUBJECT TO A FURTHER JUDICIAL TEST THAT THE VIOLATION MUST INJURE THE PUBLIC AT LARGE AND (2) AFFIRMATIVELY HELD THAT ANTITRUST LAWS PROTECT THE LIBERTY OF A TRADER TO ENGAGE IN BUSINESS UNDER SECTION 4 OF THE CLAYTON ACT.

A. RADOVICH v. NATIONAL FOOTBALL LEAGUE, ET AL., HELD THAT THE ANTITRUST LAWS "PROTECT THE VICTIMS OF FORBIDDEN CONDUCT AS WELL AS THE PUBLIC".

1. Federal jurisdiction under the antitrust laws is supported by uncontroverted allegations showing that (a) the complaint is not frivolous, (b) the defendants have engaged in predatory commercial behavior either per se in restraint of trade or in unreasonable restraint of trade, (c) the parties are in or the conduct affects any part of a substantial amount of interstate trade or commerce.

Section 4 of the Clayton Act, Appendix C herein, states that "*any* person who shall be *injured* in *his* business or property by reason of *anything* forbidden in the antitrust laws may sue therefor in any district court. . . ."

Petitioner respectfully contends that its complaint raised conduct forbidden by the antitrust laws to its injury. The complaint may be summarized as alleging the following forbidden conduct: (1) a conspiracy be-

tween ten huge interstate manufacturing firms and their distributors to refuse to sell their products to petitioner at the instance or favor of a large chain buyer; (2) a conspiracy between ten huge interstate manufacturing firms and their distributors to agree to discriminate against petitioner at the favor of a large chain buyer; (3) predatory conduct on the part of a large monopolistic buyer who had the purpose and intent to injure the petitioner in its business. The affidavits in summary judgment did not deny these allegations, but, in fact, admitted the existence of a group refusal to deal. The affidavits tended to show only that the conspirators sold their product to other competitors of the large chain buyer, as to which the size and volume of trade is unknown and that the public could obtain the products which petitioner was not privileged to sell to it. They were directed at showing that the public was not injured. They did not show any relevant economic data. They did not show the type or classification of these various other retailers. They did not show the relative volume of business of Broadway-Hale compared to the petitioner or the other accounts. They did not show that any retailer could successfully operate without the products denied to petitioner.

The courts below, however, held that these affidavits were sufficient to prevent petitioner from obtaining a trial by jury under Section 4 of the Clayton Act and the federal Constitution. It accomplished this result by declaring (a) that Section 4 of the Clayton Act applies only to conduct which the court can visualize

as involving a "public injury" and (b) that the court on summary judgment motions can construe the allegations of petitioner's complaint against it and refuse to accept bona fide allegations, not denied, that competitors have entered into conspiracies of the type condemned by the antitrust laws. Thus the court below did not affirmatively concede that petitioner had alleged a conspiracy between competitors involving an agreement not to sell. In the thirty-two page opinion, the question of "conspiracy" was discussed at pages 23-24. The court therein viewed the complaint as alleging only that the chain buying competitor, Broadway-Hale conditioned its purchases with each of the manufacturing distributing respondents. It apparently viewed the complaint as involving ten vertical arrangements between Broadway-Hale and its respondent suppliers and not involving a horizontal conspiracy between the respondents. (Cf. *United States v. Interstate Circuit, Inc.*, 1939, 306 U.S. 208, 59 S.Ct. 467.)

The appellate court has said that the federal courts under the antitrust laws lack jurisdiction to afford protection to single traders because they are involved only with matters affecting a "public injury". The petitioner contends that "public injury" is not a jurisdictional requirement under Section 4 of the Clayton Act, and that this Court has clearly and expressly so ruled. That the antitrust laws afford petitioner protection from restraints of trade practiced by interstate corporations in an appreciable market which is part of a substantial amount of interstate

commerce has been authoritatively set forth in the cases of *Radovich v. National Football League,* 352 U.S. 445, 77 S.Ct. 390, 1 L.Ed. 2d 456, and *Binderup v. Pathé Exchange,* 1923, 263 U.S. 291, 44 S.Ct. 96, 68 L.Ed. 308.

The issue of "public injury" was exhaustively briefed in the *Radovich* case. The petition for a writ of certiorari on behalf of Radovich requested that this Court consider the question of:

> "2. Whether a complaint for injuries by a private party under Section 4 of the Clayton Act is sufficient if it states violations of the antitrust laws and injury thereby?" (at p. 2.)

The appellate court had held that Radovich's complaint was insufficient under the antitrust laws because:

> "we doubt that the alleged means, restraint by the reserve cause and its enforcement, is legally sufficient to support, without more, a conclusion that these means were calculated to prejudice the public or unreasonably restrain interstate commerce." (Ninth Cir., 1956, 231 Fed.2d 620, at p. 623.)

This aspect of the Ninth Circuit opinion was fully supported by the respondents in the *Radovich* case. The National Football League in its brief for respondents claimed that "Plaintiff has failed to allege that any act of defendants upon which plaintiff predicates a claim of injury, was reasonably calculated to prejudice the public interest." (Brief of Respondent,

Radovich v. National Football League, Table of Contents, p. iii; pp. 56-59.)

Apex Hosiery v. Leader, 310 U.S. 469, was urged by the respondents in the *Radovich* case as supporting their proposition that the courts may require a showing that commercial conduct condemned in the antitrust laws involve a "public injury". The briefs of the United States of America as Amicus Curiae briefed this issue of "public injury". In its brief the United States urged that the court below "clearly erred in reading into the statutory authorization the further requirement that the plaintiff in such a suit allege and prove that the violation charged against the defendant was 'calculated to prejudice the public'." (Brief for the United States of America as Amicus Curiae, pp. 11-13.)

This Court after such presentation concluded as follows (352 U.S. 445, 453, 77 S.Ct. 390, 395):

> "Petitioner's claim need only be 'tested under the Sherman Act's general prohibition on unreasonable restraints of trade.' Times Picayune Publishing Co. v. United States, 1953, 345 U.S. 594, 614, 73 S.Ct. 872, 883, 97 L.Ed. 1277, and meet the requirement that petitioner has thereby suffered injury. Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public[10] and has provided sanctions allow-

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"[10]In Apex Hosiery Co. v. Leader, 1940, 310 U.S. 469, 60 S.Ct. 982, 84 L.Ed. 1311, this Court said: 'The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and

ing private enforcement of the antitrust laws by an aggrieved party. These laws protect the victims of forbidden practices as well as the public. Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 1948, 334 U.S. 219, 236, 68 S.Ct. 996, 1006, 92 L.Ed. 1328. Furthermore, Congress itself has placed the private antitrust litigant in a most favorable position through the enactment of § 5 of the Clayton Act.[11] Emich Motors Corp. v. General Motors Corp., 1951, 340 U.S. 558, 71 S.Ct. 408, 95 L.Ed. 534. In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws."

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services, *all of which had come to be regarded as a special form of public injury.'* (Emphasis supplied) Id., 310 U.S. at page 493, 60 S.Ct. at page 992. In Standard Sanitary Mfg. Co. v. United States, 1912, 226 U.S. 20, 33 S.Ct. 9, 57 L.Ed. 107, speaking of the antitrust laws, the Court said: *The law is its own measure of right and wrong,* of what it permits or forbids, *and the judgment of the courts cannot be set up against it* in a supposed accommodation of its policy with the good intention of parties, and, it may be, of some good results.' (Emphasis supplied) Id., 226 U.S. at page 49, 33 S.Ct. at page 15."

"[11]38 Stat. 731, 15 U.S.C. § 16, 15 U.S.C.A. § 16, declares that a final judgment against a defendant in proceedings by the Government for violation of the antitrust laws may be introduced by a private litigant in a subsequent treble damage action and establishes *prima facie* a violation of the antitrust laws."

Yet in spite of this clear declaration that "public injury" is not a jurisdictional requirement under Section 4 of the Clayton Act, the court below has declared that (at page 24):

"The purpose of the antitrust statutes is to protect the 'public' from the harm which follows

> from concerted or monopolistic conduct designed to acquire control of a market, usually competitive, to which the public must ultimately resort, and which conduct can be described as an undue restraint of trade. Notwithstanding the many phrases which may be picked at random out of numerous cases, and, out of context, be made to support the position that concerted conduct directed at harming the opportunity of a single trader to compete is always within the prohibitions of the Sherman Act, it is our opinion that there exists the need to show facts in a motion such as this from which a court might reasonably infer 'public injury' before an antitrust violation is before the court; and, further, that the Supreme Court has not departed one whit from this requirement."

But recently in *Northern Pacific Ry. Co. v. United States*, ... U.S. ....., 78 S.Ct. 514, the Court stated:

> "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."

The antitrust laws, therefore, it has always been thought, afford the public at large protection by providing that private traders operate in the channels of

interstate commerce free of restraints or predatory conduct which hinders or impedes such trade and commerce. The economic charter of liberty envisioned is that traders have a free and open competitive market so that the public will have the advantages of full and unrestrained competition.

B. BINDERUP v. PATHE EXCHANGE HELD THAT THE ANTITRUST LAWS PROTECT "THE LIBERTY OF A TRADER TO ENGAGE IN BUSINESS".

1. Jurisdiction of the federal Courts are supported by Section 4 of the Clayton Act where the alleged matters are matters of interstate trade and commerce and the defendants engaged in a combination or conspiracy in restraint thereof; the conspiracy against a trader doing business in interstate channels by interstate firms necessarily restrains interstate trade and commerce.

Jurisdictional issues in applying Section 4 of the Clayton Act involve only the question of interstate commerce. The entry into a conspiracy by otherwise competitive interstate firms necessarily supplies this jurisdictional requirement. The sum total effect of the conspiracy on the public at large is not a jurisdictional issue. Since the *Radovich* decision has rejected the concept of "public injury" as a jurisdictional requirment, the only remaining issue involved herein is whether or not a conspiracy directed at a single trader may supply the requisite jurisdictional requirements under Section 4 of the Clayton Act. The case of *Binderup v. Pathé Exchange*, 1923, 263 U.S. 291, 44 S.Ct. 96, establishes without question that jurisdictional requirements are met under allegations of the entry into forbidden conduct by otherwise competitive interstate firms against a single

trader. There can be no argument that the complaint in the *Binderup* case, as analyzed by this Court, alleged the entry into conspiracy by the respondents there solely against the petitioner, Binderup. There it was alleged that large interstate distributors of motion pictures entered into a conspiracy to force the petitioner to allow them a share of his business, and upon refusal, combined to boycott him in his business as an exhibitor-distributor. (263 U.S. 291, 303, 44 S.Ct. 96, 97.) This Court held it was error for the trial court to have granted a motion to dismiss the case after the opening statement for lack of jurisdiction. This Court held, 263 U.S. 291, 311-312, 44 S.Ct. 100:

> "Interstate commerce includes the interstate purchase, sale, lease, and exchange of commodities and any combination or conspiracy which unreasonably restrains such purchase, sale, lease, or exchange is within the terms of the Anti-trust Act, denouncing as illegal every contract, combination, or conspiracy 'in restrain of trade or commerce among the several states.' The allegation of the complaint is that the exhibitor had been procuring films from some of the distributors but had refused to buy from others, who thereupon induced the former to cease dealing with him; and that all then combined and conspired in restraint of interstate trade and commerce, to prevent him from carrying on his said business; that they have ever since refused to furnish him with film service and have caused unexpired contracts which he held with some of them to be illegally cancelled. It is difficult to imagine how interstate trade and commerce could be more ef-

> fectively restrained than by suppressing it and that, in effect, so far as the exhibitor is concerned, is what the distributors are charged with doing and intending to do. It is doubtless true that each of the distributors acting separately could have refused to furnish films to the exhibitor without becoming amenable to the provisions of the act, but here it is alleged that they combined and conspired together to prevent him from leasing from any of them. The illegality consists, not in the separate action of each, but in the conspiracy and combination of all to prevent any of them from dealing with the exhibitor. See United States v. Schrader's Son, Inc., 252 U.S. 85, 99, 40 Sup. Ct. 251, 64 L. Ed. 471; Bobbs-Merrill Co. v. Straus (C.C.) 139 Fed. 155, 191. The contracts with these distributors contemplated and provided for transactions in interstate commerce. The business which was done under them —leasing, transportation, and delivery of films— was interstate commerce. The alleged purpose and direct effect of the combination and conspiracy was to put an end to these contracts and future business of the same character and 'restricts, in that regard, *the liberty of a trader to engage in business*' (Loewe v. Lawlor, 208 U.S. 274, 293, 28 Sup. Ct. 301, 303 [52 L. Ed. 488, 13 Ann. Cas. 815] and, as a necessary corollary, to restrain interstate trade and commerce in violation of the Anti-trust Act." (emphasis added)

It is most respectfully submitted that if the respondents in the *Binderup* case could not establish the lack of jurisdiction under allegations of a conspiracy directed at Binderup alone, clearly, the court

below was in error in affirming a judgment of lack of jurisdiction because the complaint involved was cast in terms of allegations of injury to a private trader. The affidavits of respondents in summary judgment were admittedly addressed only to the issue of "public injury" and established of themselves the group refusal to deal.

See also *Bigelow v. RKO Radio Exchange,* 1946, 327 U.S. 251, 66 S.Ct. 574 (Petitioner, a motion picture exhibitor, stated to have, as of right, the freedom from restraints imposed by an unlawful conspiracy to discriminate); *Moore v. Mead's Fine Bread Co.,* 1954, 348 U.S. 115, 75 S.Ct. 148 (Federal jurisdiction supported by allegations of forbidden conduct by one large interstate firm directed solely at a single local competitor); *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.,* 1954, 346 U.S. 537, 74 S.Ct. 257 (Federal jurisdiction assumed in action involving right of a theatre operator to obtain first-run pictures in a suburban location).

C. THE ISSUES BELOW INVOLVE CONDUCT IN RESTRAINT OF TRADE BY INTERSTATE FIRMS AGAINST A TRADER ENGAGED IN BUYING ARTICLES IN INTERSTATE COMMERCE IN COMPETITION WITH AN INTERSTATE BUYER WHO INTENDS TO MONOPOLIZE A PART OF AN AREA IN INTERSTATE TRADE AND COMMERCE.

In considering the motion for summary judgment, the pleadings upon which the motion is based are to be liberally construed in favor of the party opposing the motion. *Purity Cheese Co. v. Frank Ryser Co.,* 7th Cir., 1946, 153 Fed. 2d 88; *Hoffman v. Babbit Bros. Trading Co.,* 9th Cir., 1953, 203 Fed. 2d 636;

Anderson v. United States, 2nd Cir., 1950, 182 Fed. 2d 296.

As stated in 6 Moore, Federal Practice, Second Edition, Section 56.15(3), page 2123:

> "The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issues as to all material facts, which under applicable principles of substantive law, entitle him to judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy this burden the movant must make a showing that is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. Since it is not the function of the trial court to adjudicate genuine factual issues at the hearing on the motion for summary judgment, in ruling on the motion, all inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion."

As such, it was incumbent on the court below to give full faith to the allegations of the complaint of petitioner and the inferences to be drawn from these allegations. This is especially so in view of the reticent affidavits produced by respondents who refused to file affidavits of personal knowledge refuting the allegations of conspiratorial and monopolistic conduct, and prima facie established a group refusal to deal.

1. The proceedings below involved a conspiracy to refuse to deal which is per se forbidden by the antitrust laws.

The court below was faced with the serious and bona fide allegation that the respondents had conspired to refuse to deal with it. (R. 10, allegations 6. d. i.) The affidavits of respondents, as has been pointed out, support these allegations.

This conspiracy is a per se violation of the antitrust laws. *Kiefer Stewart v. Seagram & Sons*, 1951, 340 U.S. 211, 71 S.Ct. 259; *Northern Pacific Ry. Co. v. United States*, 1958, ...U.S....., 78 S.Ct. 514. It is unlawful conduct forbidden by the antitrust laws because:

(a) It is a conspiracy composed of otherwise competitive parties which automatically destroys the free competitive market. *Binderup v. Pathé Exchange*, supra.

(b) It is an non-ancillary agreement in restraint of trade and was unlawful at common law. *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271.

(c) It is predatory commercial behavior and allows success to the participants, not because of their established ability and competence, but because of group power. *United States v. Associated Press*, 1945, 326 U.S. 1, 65 S.Ct. 1416.

In this instance it is coupled with plans by the interstate retailer participant to destroy its competitor. (R. 11, allegation 8.)

It is the conspiracy which Section 1 of the Sherman Act condemns when it involves a group refusal to

deal. The illegality of a group refusal to deal consists not in the separate action of each participant, but the conspiracy and combination of all to prevent any of them from dealing with the trader. *Binderup v. Pathé Exchange,* 263 U.S. 291, 44 S.Ct. 96.

When this Court establishes that a conspiracy to refuse to deal is a per se restraint of trade, the violation of the antitrust laws is established upon proof of the conspiracy, and not upon proof of the effect of such conspiracy upon the public. As stated by this court in *United States v. Socony Vacuum Oil Co., Inc.,* 1940, 310 U.S. 150, 221, 60 S.Ct. 811, 843:

> "Any combination which tampers with price structure is engaged in unlawful activity. * * * The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference."

In footnote 59, 310 U.S. 150, 224, 60 S.Ct. 811, 845, of said opinion, the Court has pointed out that:

> "*It is the* contract, *combination,* * * * *or conspiracy,* in restraint of trade or commerce", which § 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other. * * * And the amount of interstate or foreign trade involved is not material, * * * since § 1 of the Act brands as illegal the character of the restraint not the amount of commerce affected. [Citing cases.] In view of these considerations a conspiracy to fix prices violates § 1 of the Act though no overt act is shown, though it is not established that the conspirators had the means available for accomplishment of their objective, and though the

conspiracy embraced but a part of the interstate or foreign commerce in the commodity."

Clearly these phrases are as fully applicable to group refusals to deal which are equally per se forbidden conduct. As such, they are in complete answer to the contentions that there was other merchandise available to petitioner (see also *C. E. Stevens Co. v. Foster & Kleiser Co.*, 1940, 311 U.S. 255, 61 S.Ct. 210) and that the conspiracy only involved petitioner and not other retailers. (*Binderup v. Pathé Exchange*, supra.)

The antitrust statute allows a private trader the right to a direct action for injuries sustained as a result of forbidden conduct affecting the freeflow of interstate commerce. *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, at 279:

> "The effect of the act of 1890 is to render such contracts unlawful in an affirmative or positive sense, and punishable as a misdemeanor, and to create a right of civil action for damages in favor of those injured thereby, and a civil remedy by injunction in favor of both private parties and the public against the execution of such contracts and the maintenance of such trade restraints."

2. The proceedings below involved serious predatory monopolistic behavior by a large chain buyer of merchandise which is consistent only with an intent to monopolize a part of an area affecting a substantial amount of interstate commerce.

The complaint alleged that petitioner's competitor Broadway-Hale formulated and organized the horizontal conspiracy above mentioned. In addition it is alleged that the respondents have given Broadway-

Hale special terms and conditions in their sales to insure its success. It is alleged that Broadway-Hale "has purchased and continued to purchase the products of the manufacturer-distributor defendants upon the condition that the manufacturer-distributor defendants do not sell their products to the plaintiff." (Tr. 11-12.) No affidavit of personal knowledge was filed by Broadway-Hale showing affirmatively that it was not obtaining special privileges in the purchase of merchandise from the respondents or that it was not actively out to injure the petitioner.

As such the court below was faced with the existence of predatory monopolistic behavior. An offense under Section 2 of the Sherman Act exists when one with chain buying power *intends* to monopolize any part of interstate trade and commerce. Footnote 59, *United States v. Socony Vacuum Oil Co.,* supra; *United States v. Aluminum Co. of America,* 1945, 148 Fed. 2d 416. Clearly the issues raised by the complaint of petitioner and triable under it afford the exercise of federal jurisdiction under the antitrust laws. This case obviously does not deal with two grocerymen doing business in a small community. This action deals with substance. It involves retailers doing a substantial volume of purchases in interstate commerce in one of the major retail areas on the West Coast, Mission Street in San Francisco. This street is renowned in the furniture and appliance industry. It is a major street for the sale of furniture and household appliances in the San Francisco Bay area, the third largest consumer market in the United

States. Broadway-Hale has a major outlet on this street and this respondent, it is not denied, is a chain buyer of interstate merchandise. This interstate chain buyer, it is not denied, actually received and obtained substantial advertising allowances not allowed to its competitor, received special price concessions, and special equipment and demonstrators. These allowances were obtained from the respondents who, as a group, can easily control the retail market in household appliances. This group, it is not denied, have selected Broadway-Hale to dictate market allocations. They have, it is not denied, refused to do business with the competitors of Broadway-Hale if it so requests. This is monopolistic conduct. It is consistent with a plan to monopolize. It is consistent with an intent to monopolize on the part of respondent Broadway-Hale. These serious and substantial issues have simply not been dealt with either by the affidavits of respondents or by the courts below. Section 2 strikes at the dangerous probability of control as well as control. *United States v. Socony Vacuum Oil Co.*, supra, footnote 59. As stated by Learned Hand in *United States v. Aluminum Co. of America*, the antitrust laws strike down at plans to monopolize and will nip them in the bud. 148 Fed. 2d 416, at 431:

> "Although the primary evil was monopoly, the Act also covered preliminary steps, which, if continued, would lead to it. These may do no harm of themselves; but, if they are initial moves in a plan or scheme which, carried out, will result in monopoly, they are dangerous and the law will nip them in the bud."

The major fact established by the moving parties below was that the number of retail outlets selling the products denied petitioner increased *in number*. We have, however, the situation where if petitioner is eliminated from business, there is dangerous possibility that others may be eliminated. There is the situation that if Broadway-Hale received and continues to receive special terms and conditions in its purchases, all other accounts will be reduced to "second run" retail outlets. Despite these dangerous probabilities the court below did not require that respondents inform it of their internal policies and operations. The court did not require that the respondents submit how they classify accounts and how they sell to these classifications. The court below has stated that the antitrust laws are concerned with "substance" but it refused to require that the respondents meet serious allegations of intentions to monopolize with affidavits of "substance". The increase in the number of retail accounts may very well be consistent with a plan to establish only one retailer as a "first class" showcase and to reduce the competition to it to a large number of very small retail stores. Doubts raised by the filing of flimsy and reticent affidavits cannot be resolved against the petitioner.

The court below has emasculated the provisions of Section 2 of the Sherman Act, aimed at the intent to monopolize, and has allowed issues of fact involved in an intent to monopolize case to be decided as questions of law upon the showing of the most unobtrusive affidavits. As such the decision is clearly beyond the

authority of this Court. As such, important antitrust issues were obviated by innocuous summary judgment proceedings. See *Lawlor v. National Screen Service Corp.*, 1957, 352 U.S. 992, 77 S.Ct. 526.

II.

THE COURT BELOW IS ATTEMPTING TO CHART THE POLICIES OF JUDICIAL ENFORCEMENT OF ANTITRUST LAWS WITH INDISCRIMINATE RELIANCE ON CASES OF LIMITED APPLICATION AND WITH IMPROPER INTERPRETATION OF DECISIONS FROM OTHER CIRCUITS.

As a further consideration for the granting of a writ, petitioner respectfully contends that the decision below will subject the private antitrust suit to a sea of doubt. The opinion of the court below will give support or give impetus to dismissal of bona fide complaints under lax summary judgment affidavits. The small businessman will be faced with a decision that attempts to summarize a host of prior authorities and which attempts to apply principles established in an antitrust labor case to the favor of those that the antitrust laws are supposed to curtail. The court below has done the following: (a) It has raised the *Apex* case, a labor case, to the status of the supreme authority of judicial interpretation of the status of the private antitrust action against large aggregations of private capital; (b) it has interpreted the decisions of this court incorrectly and (c) it has summarized a host of private antitrust cases so as to limit federal jurisdiction under the antitrust laws in private cases.

A. THE APEX CASE IS A RULING THAT THE ENTRY INTO CONDUCT FORBIDDEN BY THE ANTITRUST LAWS IS A PUBLIC INJURY WITHOUT MORE.

Considering these contentions in the above mentioned order, petitioner respectfully submits that the ouster of federal jurisdiction under the antitrust laws has been accomplished by the lifting of *Apex Hosiery v. Leader,* 1940, 310 U.S. 469, 60 S.Ct. 982 to the status of being the major authoritative decision as to the principles involving judicial application of the antitrust statutes in private cases. The actual holding of the *Apex* case is that a combination of employees designed to improve labor conditions is not within the ambit of the antitrust laws by the effectuation of strike activity which stops the flow of interstate commerce at an employer's factory. Justice Stone was manifestly distinguishing in his decision the effects of practices by labor groups from conduct which restricts or suppresses ordinary commercial competition. This Court has, it is respectfully submitted, in Footnote 10 in the *Radovich* case established that *Apex* is a holding that the restriction or suppression of competition in the commercial market place is a form of public injury without more. At pages 19-20 of the opinion of the court below, it considers Footnote 10 only as an admonishment and not as a ruling by this Court that *Apex* itself disposes of the issue of "public injury" by stating that conduct forbidden by the Sherman Act is itself the creator of public injury. But *Apex* to the court below meant that it could segregate and classify the type of conduct forbidden by the Sherman Act.

Yet, the attempt to categorize forbidden conduct under the Sherman Act has been precisely and unequivocally rejected by this court. The attempt of the petitioners in *Fashion Originators' Guild v. Federal Trade Commission,* 1941, to urge on this court the same categories as used by the Ninth Circuit met with rejection. 312 U.S. 457, 466, 61 S.Ct. 702.

Clearly a conspiracy to boycott to prevent a retailer in a substantial market to obtain commodities flowing in interstate trade and the entry into a plan to monopolize a part of this trade and the oppression of a trader doing business which affects such trade is a "control of the market to the detriment of *purchasers* or consumers of goods and services."

Next, the court below relied on *Times Picayune Pub. Co. v. United States,* 1953, 345 U.S. 594, 73 S.Ct. 872, as applicable to an antitrust action involving a group conspiracy. This case did not hold that the federal courts were without jurisdiction to decide the merits of the controversy between the newspaper and the United States, but only that after an extensive trial involving the testing of information of substance and materiality that the United States had not made out a case. This case is a clear guide to the type of information and statistics that must be filed under summary judgment procedure and at trial to establish such a decision. To determine reasonableness, the Court held, involves inquiry as to "the percentage of business controlled, the strength of remaining competition and whether the action springs from business

requirements or purpose to monopolize". The affidavits of the respondents below failed for the most part to give the court such information. Such information if given would not relate to a per se conspiracy charge as involved here. See also *Northern Pac. Ry. Co. v. United States,* 1958, ... U.S. ....., 78 S.Ct. 514.

B. THE TENTH CIRCUIT HAS REJECTED THE REQUIREMENT OF PUBLIC INJURY SET FORTH IN FEDDERSON MOTORS v. WARD, AND SHOTKIN v. GENERAL ELECTRIC.

The court below supports its decision by citation to *Shotkin v. General Electric Co.,* 10 Cir., 1948, 171 Fed. 2d 236, and *Fedderson Motors v. Ward,* 10 Cir., 180 Fed. 2d 519. The proposition advanced is that some restraints of trade are so remote in their effect on the public at large that they are not restraints for Sherman Act purposes. (Opinion below, p. 24.) But the Tenth Circuit in *New Home Appliance Center v. Thompson,* 1957, 250 Fed. 2d 881, has now held that the test of a restraint of trade is not to be viewed as to its effects on the public at large but, rather to the type of conduct entered into by the defendants and their dealings in interstate commerce. It states at p. 884:

> "But, any horizontal agreement among local competitors or with manufacturers, which has the purpose and effect of fixing or stabilizing prices at local levels, or apportioning territories, or suppressing competition, is illegal per se if interstate commerce is utilized, or if such concerted acts have the effect of restraining the free flow of interstate commerce. See Moore v. Mead's Fine

Bread Co., 348 U.S. 115, 75 S.Ct. 148, 99 L.Ed. 145; United States v. Frankfort Distilleries, 324 U.S. 293, 65 S.Ct. 661, 89 L.Ed. 951; United States v. McKesson & Robbins, 351 U.S. 305, 76 S.Ct. 937, 100 L.Ed. 1209. In these circumstances, the amount or quantity of interstate commerce is unimportant, it is the nature or the tendency of the agreement which the act proscribes. Gamco, Inc. v. Providence Fruit & Produce Bldg., 1 Cir., 194 Fed. 2d 484; United States v. McKesson & Robbins; supra."

C. THE ANTITRUST LAWS ARE A CHARTER OF LIBERTY AND HAVE UNRESTRICTED APPLICATION.

Next, the court below has vitiated the principle of law which has been stated in various private antitrust cases that the federal courts under the antitrust laws are concerned when competitors combine to the injury of a trader. It says that all cases support the proposition that the antitrust laws are not concerned with conduct which does not harm the public at large. It thereupon attempts the following categorization: (a) a private party can obtain federal jurisdiction under the antitrust laws only when he is one of a few competitors and his elimination will thereby substantially affect competition; or (b) only when the defendants possess large scale monopolistic power derived from nationwide enterprises, and such power is used to eliminate him; or (c) only when the defendants control or attempt to control *all* competition, and/or the private party is a member of an *entire* class to which a conspiracy is directed. (Opinion below, p. 29.)

But the cases analyzed by the court below simply do not hold in their decisions that the above mentioned factors are the bases for their decisions.

1. The antitrust laws are not necessarily concerned with control over all competition.

Three motion picture cases decided by this Court, *United States v. Paramount Pictures, Inc.*, 1948, 334 U.S. 131, 68 S.Ct. 811, *United States v. Schine Chain Theatres, Inc.*, 334 U.S. 110, 68 S.Ct. 947, *United States v. Griffith*, 1948, 334 U.S. 100, 68 S.Ct. 941, involve the monopolization of early run motion pictures. They point out explicitly that defendants do not have to attempt to control all the market or all competitors to run afoul of the act. It is sufficient if the conduct of the defendants is an attempt to reach the "cream" of the business or a segment of the market. These cases clearly required the courts below to demand that manufacturer-distributor respondents inform them as to whether or not Broadway-Hale was their only "first class" customer and how they classified their retail accounts. The total number of competitors sought to be controlled in these cases was not deemed controlling. Thus this Court was not concerned with the total number of theatres in an area but rather with the conspiracy to control the "first run" theatre market.

2. Given the jurisdictional requirements of interstate commerce, the lower courts have protected the single trader from predatory conduct in restraint of trade.

Lower court decisions of other circuits involving private actions cited by the court below, *White Bear Theatre Corp. v. State Theatre Corp.*, 8th Cir., 1942,

129 Fed. 2d 600, *William Goldman Theatres v. Loew's Inc.*, 3 Cir. 1945, 150 Fed. 2d 738; *Paramount Film Distributing Corp. v. Village Theatre,* 10th Cir. 1955, 228 Fed. 2d 271; *Victor Talking Machine v. Kemeny,* 3 Cir., 1921, 271 Fed. 810; *Roseland v. Phister,* 7 Cir., 1942, 125 Fed. 2d 417; *Package Closure Corp. v. Sealright Co.,* 2 Cir., 1944, 141 Fed. 2d 972; *Johnson v. J. H. Yost Lumber Co.,* 8th Cir., 1941, 117 Fed. 2d 53, were holdings that the antitrust laws afford protection to private traders and that private traders have the right to operate in interstate channels free of the conduct condemned in the antitrust laws. They simply do not base their decisions on the categories suggested by the Ninth Circuit.

The *White Bear* court condemned the attempts of a theatre operator to eliminate a competitor in a small city in Wisconsin. It held at 129 Fed. 2d 600, 604:

> "The attempts of defendants to monopolize the 'first run' films in commerce, for the purpose of putting the plaintiff out of the motion picture theatre business at White Bear Lake must consequently, on plaintiff's evidence, be held to have presented a case for the jury, under the Sherman Act."

The court found an inherent injury to the public interest on the showing that the defendants had entered into conduct which interfered with the "competitive freedom in buying and selling" in a market affecting interstate trade and commerce.

The *Goldman* court decided that the control of a very small part of the total number of theatres in

Philadelphia, the first run theatres, by a circuit theatre operator was a part of interstate trade and commerce which could be monopolized; and that a conspiracy of this first run operator with interstate distributors of motion pictures directed at the plaintiff was within the Sherman Act. The decision of the Second Circuit allowed plaintiff recovery because "plaintiff does have the right to have its business protected if there is a concert of action *directed at plaintiff*, which results *in its removal* from competition." The Second Circuit did not discuss whether the defendants were improperly fixing prices or whether the public was being deprived of the right to see motion pictures. The destruction of the free market, unduly hindering or obstructing the free flow of commerce in the channels of interstate trade had, however, been proved. "Combination which unreasonably limits competition which would otherwise exist is illegal." (150 Fed. 2d. 743.)

Roseland v. Phister involved the market opportunities of an agent of the defendant. The conduct condemnable was not aimed at class of agents, but at the destruction of the free market in which plaintiff was doing business. Section 4 of the Clayton Act was held to have afforded any person a direct remedial right, not subsidiary to the public right, for the recovery of damages suffered from the entry into conduct of the type condemned by the Sherman Act.

Victor Talking Machine Co. v. Kemeny held that a retailer has a direct cause of action against distributors engaged in interstate commerce who have entered

into a conspiracy to refuse to deal with him. 271 Fed. 810, 818.

Both the *Village Theatre* case and the *J. H. Yost Lumber Co.* case involved trial on the merits. In each case the conspiracies were directed at private traders. The *Village Theatre* case involved a single vertical conspiracy between a chain buying exhibitor, its parent and an interstate distributor.

The *Package Closure* case involved a conspiracy to drive the plaintiff out of business by interstate manufacturers who held substantial monopoly control over the manufacture and sale of bottle hoods. But the decision of the court does not base the plaintiff's right to its jurisdiction on the proof of injury to the public at large, but rather, that forbidden conduct had been entered into by the defendants with the purpose of destroying the single plaintiff.

The court stated at 141 Fed. 2d 972, 978:

> "Accordingly, when persons aim not to compete but to eliminate competition, when, with that intent, they combine to fix prices so as to destroy a rival, and when their conduct has that effect, the injured rival may recover three times the resultant damages. It is defendants' price fixing conspiracy for the illegal purpose and with the consequence alleged by plaintiff which gives plaintiff here a good claim under the Act."

In *Package Closure* the conspirators unreasonably lowered prices against plaintiff; here they agreed to discriminate against him, not to sell to him, and to allow the effectuation of a monopolistic intent.

In short the lower courts have not based their decisions conferring federal jurisdiction to private parties under the antitrust laws because of the classifications suggested by the Ninth Circuit. These courts have sought to find the following: (1) whether the complaint alleges the type of conduct forbidden by the antitrust laws; (2) whether the parties are in or involve or affect interstate trade and commerce; and (3) whether or not the private plaintiff was faced with the destruction of a free and open competitive market to his injury and damage.

The court below, it is respectfully submitted, has confused jurisdictional tests under the antitrust laws which are concerned only with interstate commerce, with "violation" tests which involve reasonable or unreasonable conduct. That the free flow of interstate commerce, supporting federal jurisdiction, is impeded when a combination stops the flow of merchandise in interstate channels to *a single trader* has been authoritatively set forth in the *Binderup* case. That the court is in error in attempting to apply the unreasonableness test to "interstate trade and commerce" issues, by saying the public at large must be affected by the conduct condemned in the antitrust laws, has been authoritatively stated in the *Radovich* case.

A decision which denies the rights of a single trader to federal antitrust protection, a charter of economic liberty, ought not, it is respectfully submitted, be allowed to prevail.

CONCLUSION.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated, San Francisco, California,
May 28, 1958.

Respectfully submitted,

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Attorneys for Petitioner.

(Appendices A, B and C Follow.)

Appendix A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

KLOR'S, INC., *Appellant,* vs. BROADWAY-HALE STORES, INC., et al., *Appellees.*	No. 15,380 Mar. 28, 1958

Appeal from the United States District Court for the Northern District of California, Southern Division.

Before: DENMAN, BARNES and HAMLEY, Circuit Judges.

BARNES, Circuit Judge:

I. The Private Plaintiff in Antitrust Litigation.

Section 4 of the Clayton Act provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained."

Passing for the present an examination of what "thing" is forbidden, we note a tendency in some courts to narrow the apparent scope of this statute due to concern with the severity of the penalty.[1]

In a recent case this Court said:

> "A niggardly construction of the treble damage provision would do violence to the clear intent of Congress. The pri-

[1] **Snow Crest Beverages Inc. v. Recipe Foods, Inc.**, D.Mass., 1956, 147 F.Supp. 907, 909; **Harrison v. Paramount Pictures Inc.**, E.D.Penn. 1953, 115 F.Supp. 312; **Cf: Congress Bldg. Group v. Loews, Inc.**, 7. Cir., 1957, 246 F.2d 587.

vate antitrust action is an important and effective method of combating unlawful and destructive business practices. The private suitor complements the government in enforcing the antitrust laws. The treble damage provision was designed to foster and stimulate the interest of private persons in maintaining a free and competitive economy. Its efficacy should not be weakened by judicial construction." *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 398, cert. denied, 355 U.S. 835 (1957).

Of more importance is what the Supreme Court has said. In reversing an antitrust case from this Circuit in 1957, that Court admonished the trial and appellate federal courts that:

> "Petitioner's claim need only be 'tested under the Sherman Act's general prohibition on unreasonable restraints of trade,' [citing cases] and meet the requirement that petitioner has thereby suffered injury."[2]

With these principles in mind, we proceed to an examination of what is forbidden by the antitrust laws, as stated in Section 4 of the Clayton Act.

The Sherman Act's first and second sections are relied on by the pleadings in this case.[3]

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[2] **Radovich v. National Football League**, 1957, 352 U.S. 445, 453:
"Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. These laws protect the victims of the forbidden practices as well as the public. [Citing cases] Furthermore, Congress itself has placed the private antitrust litigant in a most favorable position through the enactment of §5 of the Clayton Act. [Citing cases] In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws." **Ibid.**

[3] 15 U.S.C. §1: "Every contract, conbination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States . . . is declared to be illegal. . . ."
15 U.S.C. §2: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce . . . shall be deemed guilty of a misdemeanor. . . ."

Does the Sherman Act mean *every* contract, and *every* restraint, or must it be interpreted? Must it be aided by a Rule of Reason, and if so, what is that Rule of Reason? The problem is not a new one, nor is it easy. Not only do competent judges disagree—they frequently reach similar destinations by differing circuitous routes.[4]

Suffice it to say that from a period shortly after the early pronouncements of our Supreme Court which made the Sherman Act a comparatively dead law,[5] succeeding Supreme Court Justices have found it necessary to interpret the precise language used in the Act and determine its proper construction.[6] Even such a "literalist" as Mr. Justice Peckham eventually came to that view,[7] at least with regard to what constituted interstate commerce, even if he could not agree with Mr. Justice White on what was meant by "every restraint." And, although the statu-

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[4]"Unity of decision does not always require unity of theory." Handler, Antitrust in Perspective 11 (1957).

[5]See, **e.g., United States v. E. C. Knight Co.**, 1895, 156 U.S. 1.

[6]Compare **United States v. Joint Traffic Association**, 1898, 171 U.S. 505, 567-8, with **United States v. Trans-Missouri Freight Ass'n**, 1897, 166 U.S. 290, 312, where similar contracts with similar purposes (design to fix freight rates) were under consideration.

[7]"The Act of Congress must have a reasonable construction or else there would scarcely be an agreement or contract among businessmen that could not be said to have, indirectly or remotely, some bearing on interstate commerce and possibly to restrain it." **Hopkins v. United States**, 1898, 171 U.S. 578, 600.

[8]Professor Handler tells how Mr. Justice White "avoided the embarrassment of the word 'every' in two ways. First, he regarded the Sherman Act as codifying the common law and . . . embodying the same rule of reason sanctioned by prior law. 16/ (United States v. Trans-Missouri Freight Asso., 1897, 290, 353-356.) Second, he asserted that the phrase 'restraint of trade,' both in the prior decisions and the statute, signified illicit arrangements only. 17/ (**Id.** at 345-352.) Under this view, if an agreement was reasonable, it was not in restraint of trade. According to White's theory, the rule of reason had been built into the very words and structure of the legislation. . . .

White . . . in his **Standard Oil** and **American Tobacco (United States v. American Tobacco Co.**, 1911, 221 U.S. 106) opinions . . . by this

tory language "is literally all encompassing, the courts have construed it as precluding only those contracts or combinations which 'unreasonably' restrain competition."[8a]

With this brief introduction, let us turn to the pleadings and evidence of this case.

II. The Pleadings.

Plaintiff corporation sues many defendants, claiming a cause of action under Sections 4 and 16 of the Clayton Act,[9] by reason of defendants' alleged violation of Sections 1 and 2 of the Sherman Act.[10]

The complaint alleges plaintiff is the owner and operator of a retail store engaged in the business in San Francisco of selling radios, television sets, clothes washers, refrigerators, electric and gas stoves, phonographs and various electrical appliances. Plaintiff charges defendant Broadway-Hale Stores, Inc., a corporation, is a competitor in the purchase and sale of such household appliances, operating a chain of stores in the western states and one specific store in the general vicinity of plaintiff's retail store in the Mission District area of San Francisco, California. The eighteen other defendants named are ten leading manufacturers[11]

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strained rationale . . . finally succeeded in introducing a rule of reason into our antitrust jurisprudence. • • •

Under (Mr. Justice) Taft's view, there was no place for a rule of reason where the restrictions on competition were nonancillary. • • •

. . . [T]he English courts had . . . abandoned the initial rule of total invalidity (of restraints of trade) and enforced agreements not to compete when ancillary to some major lawful purpose and reasonable in duration and extent. . . . • • •

. . . [C]ommon law . . . did not employ the phrase 'restraint of trade' synonymously with illegality." Handler, Antitrust in Perspective, 11 (1957).

[8a]**Northern Pacific Railway Co. v. United States**, 1958, 355 U.S. 649, 651, citing **Standard Oil Co. of New Jersey v. United States**, 1911, 221 U.S. 1, and **Chicago Board of Trade v. United States**, 1918, 246 U.S. 231.

[9]Title 15 U.S.C. §§15, 26.

[10]Title 15 U.S.C. §§1, 2.

[11]Admiral Corporation; Zenith Radio Corporation; Whirlpool-Seeger Corporation; Radio Corporation of America; Emerson Radio and Phono-

and eight distributors[12] of such household appliances mentioned above.

Plaintiff charges that all defendants beginning prior to 1952 "have restrained trade and commerce in the interstate distribution and sale" of the described types of goods in the San Francisco area "by contracting, combining, conspiring together, and each with the other in restraint and monopoly of such trade and commerce" and "have substantially lessened, limited, and restrained competition in said trade and commerce."[13]

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graph Corporation; Philco Corporation; Rheem Manufacturing Company; General Electric Company; Olympic Radio and Television, Inc.; and Tappan Stove Company.

[12]Admiral Distributors, Inc.; H. R. Basford Company; Leo J. Meyberg; Jefferson-Travis, Inc.; Philco Distributors, Inc.; General Electric Dist. Corporation; Olympic Television of Northern California; and O'Keefe and Merritt Company.

[13]Plaintiff's pertinent allegations were:

"• • • 6. • • • Beginning at a period prior to 1952, and continuing uninterrupted up to and including the date of filing this complaint, the defendants, all well knowing the facts herein alleged, have restrained trade and commerce in the interstate distribution and sale of radios, television sets, clothes washers and dryers, refrigerators, electric and gas ranges, phonographs and electric appliances in the San Francisco Bay Area, by contracting, combining, conspiring together, and each with the other, in restraint and monopoly of such trade and commerce contrary to Sections 1 and 2 of the Act of Congress . . . 15 U.S.C.A., Sections 1 and 2, and have thereby substantially lessened, limited and restrained competition in said trade and commerce, and have prevented plaintiff from obtaining (the above articles) for resale; and have discriminated against plaintiff and in favor of plaintiff's competition in the sale and distribution of the products; and have refused to sell to or enter into any contract to sell products to plaintiff. Such combination, conspiracy and agreement tend to and do actually restrain and monopolize interstate commerce in the distribution and sale of (the listed products) in favor of Hale. More particularly, the manufacturer-distributor defendants in pursuing a policy in favor of Hale and against plaintiff have done and are continuing to do the following acts:" There then follows a list of nine particular acts which defendants are alleged to have done, all directed solely at plaintiff and in favor of the defendant Broadway-Hale. • • •

"8. The defendant Hale operates a chain of key stores in the west coast area of the United States. It enjoys a monopolistic buying power

Various alleged discriminations in sale, supply, price, terms, etc., are charged in count one of the complaint as part of the conspiracy. Counts two through thirty-one charge violations of the Robinson-Patman Act[14] and counts thirty-two through forty-one charge violations of § 13(f) of the Robinson-Patman Act[15]—discrimination in price, services, etc.

III. Proceedings in the District Court.

By pre-trial order count one was limited to a single conspiracy charging a Sherman Act violation.[16]

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by reason of the large number of retail outlets it operates. It has used its monopolistic buying power to negotiate terms and conditions of acquisition and purchase of the products manufactured, distributed and sold by the manufacturer-distributor defendants. It has used its monopolistic buying power to deny to plaintiff its competitive position in the acquisition, purchase and sale of the products manufactured, distributed and sold by the manufacturer-distributor defendants and, in particular, has purchased and continues to purchase the products of the manufacturer-distributor defendants upon the condition that the manufacturer-distributor defendants do not sell their products to the plaintiff. The manufacturer-distributor defendants have dealt with Hale throughout the period of time alleged on a chain basis and have manufactured, distributed and sold products for resale in the San Francisco Bay Area in consideration of manufacturing, distributing and selling the products to Hale for resale in other parts of the West Coast area of the United States. • • •

"9. By reason of the monopoly buying power of defendant Hale, and the illegal and discriminatory tactics, combinations, conspiracies and agreements in restraint of trade by the manufacturing-distributor defendants acting in collaboration, the business of plaintiff has been seriously impaired, injured and damaged, and the plaintiff has suffered great damage in loss of profits, good will, reputation and prestige of its store as a retail dealer in (the listed products). Plaintiff has been paying unreasonable and discriminatory prices and has been subjected to unfair, unreasonable and discriminatory practices to the damage and loss of plaintiff and to the advantage of defendants, all by reason of the defendants' violation of the anti-trust laws."

[14]Title 15 U.S.C. §13(a), (d) and (e).

[15]Title 15 U.S.C. §13(f).

[16]"1(a) . . . Count one of the Complaint is and shall in all further proceedings be interpreted and construed as one seeking relief solely with

Subsequently, under Federal Rules of Civil Procedure 42(b), the trial court ruled:

> "Count one of the complaint and the claim for relief tendered thereby are to be treated in all respects as if they constituted a separate action."

All but one of the defendants (18 of 19) then moved to dismiss count one of the complaint,

> ". . . for failure to state a claim upon which relief can be granted, and for summary judgment on said Count One on the ground that there is no genuine issue as to any material fact and the moving parties are entitled to a judgment as a matter of law."

In support of this motion, the moving parties submitted a dozen affidavits. Appellant stood on the pleadings and papers on file, filing no documents in opposition to the motion. It should be noted here that the court below did not rule on the pleadings nor grant the motion to dismiss by reason of any failure therein. While a motion to dismiss was made, it was apparently passed over so that the motion for summary judgment could be determined. That latter motion having been granted, it was necessarily dispositive of the motion to dismiss.

The District Court granted the motion for summary judgment by preliminary order and subsequent formal judgment.[17] The preliminary order is short, and reads as follows:

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respect to a conspiracy under the Sherman Act . . . and not as seeking to assert any claim for relief under the Robinson-Patman Act. . . .

(b) Count one of the Complaint is amended by striking the words 'combinations, conspiracies and agreements' in paragraph 9, . . . and substituting the words 'combinations, conspiracy and agreement'. . . ." (Tr. p. 20.)

[17] "The Court having heretofore on June 8, 1956 and on June 22, 1956 made its orders for separate trials by virtue of which Count One of the complaint and the claim for relief tendered thereby are to be treated in all respects as if they constituted a separate action, and defendants having thereafter severally moved to dismiss Count One of the complaint and the claim for relief tendered thereby and for summary judgment

"It appears from the allegations of count one of the complaint and from the undisputed affidavits supporting the motion for summary judgment that there is no genuine issue of fact respecting the claim for relief tendered by count one of the complaint.

Count one is not a cause of action under the Sherman Anti-Trust Act. It is not concerned with private damages caused by a public wrong proscribed by the Act.

It is just the case of a retail store in the Mission District of San Francisco—one of hundreds in the city engaged in selling the same kind of merchandise—which has a plaint that certain supplier defendants won't sell it some merchandise, allegedly at the behest of one of its competitors. It is purely a private quarrel, (perhaps otherwise legally remediable) arising out of some undisclosed cause—the nature of which we may suspect, but do not know.

There is not the slightest basis either in substantiality or law for the exercise of our jurisdiction.

The motions are granted. . . ."

This appeal is from the motion granting summary judgment. Count one alone is involved. The other forty counts are not before us.

IV. The Issues.

Appellant makes but one specification of error—namely, that it was error to grant a motion for judgment or dismiss a com-

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thereon, and it appearing that there is no genuine issue of fact respecting the claim for relief tendered by said Count One,

It Is Hereby Ordered, Adjudged and Decreed that said motions to dismiss and said motions for summary judgment are and each of them hereby is granted, and that said Count One and the claim for relief tendered thereby be and they are hereby dismissed as to each and every defendant, and that plaintiff take nothing by them, and the Court hereby expressly determines that there is no just reason for delay in the entry of the foregoing judgment and the clerk is hereby expressly directed to enter the foregoing judgment forthwith. . . ." [Tr. pp. 135, 136.]

plaint seeking damages under § 4 of the Clayton Act based upon an alleged violation of the Sherman Act plus consequent damage to plaintiff because the complaint had failed to allege and plaintiff had failed to prove, as an additional element, a "public injury."

Appellees do not agree that the trial court's action (and alleged error) can be so described. They agree that if there has been alleged a violation of the Sherman Act, plus consequent damage to a private plaintiff, a cause of action is stated. They claim a violation of the Sherman Act was not pleaded, and more important, not established by the evidence before the court on the motion to dismiss. This was because the restraint of trade relied on was not a restraint of trade recognized as such at common law which constitutes a per se violation of the Sherman Act; and in the absence of such a type of violation, there must be alleged a restraint, injurious to the public if proved, in order to constitute an actionable violation of the Sherman Act, either in pleading or proof. The question before the trial court, say appellees, and now here, is this:

> "(1) Is the charged restraint of trade of a kind falling within the purview of the Sherman Act?"

and secondarily,

> "(2) Does the conspiracy have the necessary relation to interstate commerce?"

Both questions must be answered affirmatively, say appellees, before appellant can prevail.

To put it another way, appellant contends that *any* contract, combination or conspiracy which restrains trade or commerce, no matter in what degree and no matter against whom or how many persons similarly situated the restraint is directed, *always* violates the Sherman Act proscription.

Appellant argues that

> "[T]he public in any part of interstate commerce is entitled to the competition of *all* traders and the public interest is *necessarily* impaired when *a* trader is eliminated. . . . The antitrust laws are a trader's statute which protect the trader

from unlawful conduct in restraint of trade in order to insure that the public obtains a true competitive market."[18]

Appellees, on the other hand, contend with equal vigor that not every restraint upon a single competitor is a restraint of trade or commerce within the meaning of the Sherman Act. They argue, in essence, that a plaintiff, in order to succeed on this motion for summary judgment must allege in his complaint (if he is willing to rely solely upon it in opposition to appellees' affidavits) sufficient facts to prove, or from which it may be inferred, that the public as a whole is or may be in some way affected by the defendants' conduct; *i.e.*, that the conduct attacked has some *substantial* effect on the particular relevant market involved.

Appellant quotes at length from, and largely relies upon, both the briefs filed and the opinion rendered in *Radovich v. National Football League*,[19] certain motion picture antitrust cases, e.g. such as *United States v. Paramount*, 1948, 334 U.S. 131; *United States v. Schine*, 1948, 334 U.S. 110; *United States v. Griffith*, 1948, 334 U.S. 100; *Bigelow v. R.K.O.*, 1946, 327 U.S. 251; *Binderup v. Pathe*, 1923, 263 U.S. 291; *Hart v. B.F. Keith Vaudeville Exchange*, 1923, 262 U.S. 271, and pleadings cases like *United States v. Employing Plasterers Ass'n.*, 1954, 347 U.S. 186.

It is appellant's position that "Radovich . . . overruled this court and thus overruled its principal supports, *Fedderson*[20] and *Shotkin*."[21]

Appellees urge that they have carefully maneuvered around the pitfall of a motion to dismiss premised on the pleadings; that they have filed twelve affidavits uncontradicted by anything other than the complaint, as amended by pre-trial order;[22] that

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[18]Appellant's Opening Brief, p. 7. (Emphasis added.)

[19]352 U.S. 445 (1957).

[20]180 F.2d 519 (10 Cir. 1950).

[21]171 F.2d 236 (10 Cir. 1948).

[22]The voluntary amendment of the complaint as to damages is here immaterial.

the court passed on an "undisputed factual situation;"[23] and, that the trial court's finding and the summary judgment based thereon is required by §§ 1 and 2 of the Sherman Act, as interpreted by the Supreme Court, particularly in *Apex Hosiery v. Leader*, 1940, 310 U.S. 469, and those cases which are claimed to follow it.

V. The Facts.

The facts, as set forth in the affidavits, and undisputed by appellant, were summarized by appellees as follows:

> "Appellant and appellee Hale are not the only retailers of appliances in San Francisco. There are literally hundreds, if not thousands, of others (R. 25-27). The classified section of the San Francisco Telephone Directory contains 14 pages of listings (R. 29-43). In San Francisco alone are sold not only the brands of appliances involved in this case but many other competing brands (R. 26-27). In addition to the 7 brands of television sets, radio and phonographs mentioned in the complaint, there are 20 other competing brands sold in San Francisco. In addition to the three mentioned brands

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[23] "The Court: You're really relying, then, on not so much the motion to dismiss as on the motion for summary judgment.

Mr. Lasky: I think it's a motion for summary judgment.

The Court: You are stating that as a matter of fact that a case is not stated because of an undisputed factual situation. • • •

Mr. Goldstein: May it please the Court, the conspiracy charged in count one of the complaint is this: No matter how counsel may attempt to avoid it, no matter how abstruse are some of his deductions, it does amount to this and on which the plaintiff rests his case. • • •

The Court: Well, all that I was endeavoring to do, Mr. Goldstein, was to get the question down to a somewhat simple basis. The private right in antitrust arises out of the private damage because of the public wrong.

Mr. Goldstein: Yes, sir.

The Court: In other words, it doesn't arise out of a private wrong; it arises out of a public wrong.

Mr. Goldstein: There must be, as I have conceded, there must be some public interest.

The Court: And the private individual where there is a public wrong has only a cause of action when he can show that the public wrong caused him some damage.

Mr. Goldstein: Yes, sir. • • •" [Tr. pp. 145, 146.]

of refrigerators there are 18 other competing brands. In addition to the 5 mentioned brands of stoves, there are 23 competing brands; in addition to the 2 mentioned brands of clothes washers and dryers, there are 30 competing brands. Among these competing brands are many of the outstanding and most widely advertised brands in the country, including the names Capehart, Crosely, Du Mont, Hallicrafter, Hoffman, Magnavox, Motorola, Packard-Bell, Scott, Westinghouse, Amana, Bendix, Coldspot, Frigidaire, Hotpoint, International Harvester, Kelvinator, Norge, Servel, Chambers, Roper, Thermador, Western Holly (see listing at R. 26-27). Appellant does not charge that he was denied the right to handle any of this vast number of brands manufactured and sold by companies not parties to this action.

Moreover, a large number of other retailers sell to the San Francisco public the very brands referred to in the complaint. At the date of filing suit the number of dealers *in San Francisco* handling these products was as follows: (See note 24/.)

In the *Mission District alone*, in San Francisco, there are 53 dealers selling the brands referred to in the complaint. Restricting the area under consideration even more narrowly, *to Mission street alone*, a member of the public desiring to purchase an appliance and strolling down Mission Street for a span of but 11 blocks, of which appellant's store is approximately in the center, would pass the shops of 43 re-

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24"Admiral products ..... 195 retailers (R. 45)
Zenith products ..... 153 retailers (R. 48)
Whirlpool products ..... 67 retailers (R. 50)
RCA products ..... 127 retailers (R. 52)
Emerson products ..... 109 retailers (R. 54)
Philco products ..... 175 retailers (R. 58)
Rheem products ..... 56 retailers (R. 62)
GE products ..... 110 retailers (R. 66)*
Olympic products ..... 33 retailers (R. 116)
Tappan products ..... 13 retailers (R. 118)
O'Keefe & Merritt products ..... 65 retailers (R. 121)

*The figure given is for GE television dealers. The figure for GE major appliance dealers is 54 and for dealers in GE radios and traffic appliances it is 463."

tailers, selling the specific items and brands referred to in the complaint. Defendants' Exhibit A on the motion (R. 146) is a chart bringing together the factual data taken from the 12 affidavits. Since it strikingly exemplifies the fact, a copy is inserted opposite this page.

Finally, it may be noted that while the alleged conspiracy is charged as having begun prior to 1952 (R. 9), the number of retail stores in San Francisco selling the items and brands referred to in the complaint steadily increased after 1952 and up to the time of the commencement of the suit. Admiral dealers increased from 150 to 195, and in the Mission District alone from 20 to 36; Zenith from 120 to 153; Whirlpool dealers from 40 to 47; Emerson from 40 to 109 and in the Mission District alone from 13 to 29; Philco from 79 to 175 and in the Mission District alone from 22 to 47; Wedgewood Stove dealers from 41 to 56 and from 8 to 9 in the Mission District alone; General Electric dealers and RCA have run into the hundreds for years and there have been no material variations. (This data appears in the 12 affidavits, R. 25 to 125)."

VI. The Law.

Apex Hosiery Co. v. Leader, supra, teaches that not every restriction on commerce is a restraint of trade within the meaning of the Sherman Act.

First, the restraint must "occur in or affect commerce between the states • • • for constitutional reasons." *Id.* at 498.

We need not concern ourselves here with the substantiality of the amount of commerce involved. *Apex* tells us "it is the nature of the restraint and its effect on interstate commerce, and not the amount of the commerce which are the tests of violation." *Id.* at 485.[25]

Second, "the restraints at which the Sherman law is aimed, and which are described by its terms, *are only those which are*

[25]Citing **United States v. Socony-Vacuum Oil Co.**, 1940, 310 U.S. 150, 225. See also, **Times-Picayune Pub. Co. v. United States**, 1953, 343 U.S. 594, 611; **Lorain Journal Co. v. United States**, 1951, 342 U.S. 143, 151, n. 6; **United States v. Paramount Pictures**, 1948, 334 U.S. 131, 173; **United States v. Yellow Cab Co.**, 1947, 332 U.S. 218, 225-226.

comparable to restraints deemed illegal at common law. . . ." [Emphasis added.] *Id.* at 498. The drafters of the Sherman Act "extended the condemnation of the statute to restraints effected by any combination in the form of trust or otherwise, or conspiracy, as well as by contract or agreement, having those effects on the competitive system and on purchasers and consumers of goods or services which were characteristic of restraints deemed illegal at common law. . . ." *Ibid.*

In deciding the question of whether a conspiracy of workers to stop factory production was "the kind of restraint of trade or commerce at which the Act is aimed,"[26] the Supreme Court in *Apex* had the same question (in different form) to answer as is here raised by the motion to dismiss. It is to be remembered that in *Apex* this question was required to be answered "even though a natural and probable consequence of their (the strikers') acts and the only effect on trade or commerce was to prevent substantial shipments interstate by the employer."[27]

> "The critical words which circumscribe the judicial performance of this function so far as the present case is concerned are 'Every . . . combination . . . or conspiracy in restraint of trade or com. rce.' Since in the present case, as we have seen, the natural and predictable consequence of the strike was the restraint of interstate transportation *the precise question which we are called upon to decide is whether that restraint* resulting from the strike maintained to enforce union demands by compelling a shutdown of petitioner's factory *is the kind of 'restraint of trade or commerce' which the Act condemns.*"[28]

The court then traces some of the background of the Sherman Act and states:

> "The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers

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[26] **Apex Hosiery v. Leader**, 1940, 310 U.S. 469, 487.

[27] **Ibid.**

[28] **Id.** at 490. (Emphasis added.)

of goods and services, all of which had come to be regarded as a special form of public injury.[29]

• • •

For that reason the phrase 'restraint of trade' which, as will presently appear, had a well-understood meaning at common law, was made the means of defining the activities prohibited. The addition of the words 'or commerce among the several states' was not an additional kind of restraint to be prohibited by the Sherman Act but was the means used to relate the prohibited restraint of trade to interstate commerce for constitutional purposes, Atlantic Cleaners & Dyers v. United States, 286 U.S. 427, 434, so that Congress, through its commerce power, might suppress and penalize restraints on the competitive system which involved or affected interstate commerce."[30]

In *Apex* Justice Stone went on:

"The common law doctrines relating to contracts and combinations in restraint of trade were well understood long before the enactment of the Sherman Law. They were contracts for the restriction or suppression of competition in the market, agreements to fix prices, divide marketing territories, apportion customers, restrict production and the like practices, which tend to raise prices or otherwise take from buyers or consumers the advantages which accrue to them from free competition in the market. . . .

In seeking more effective protection of the public from the growing evils of restraints on the competitive system effected by the concentrated commercial power of 'trusts' and 'combinations' at the close of the nineteenth century, the legislators found ready at their hand the common law concept of illegal restraints of trade or commerce. In enacting the Sherman law they took over that concept by condemning such restraints wherever they occur in or affect commerce between the states. They extended the condemnation of the statute to restraints effected by any combination

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[29]Id. at 493.

[30]Id. at 494-495.

in the form of trust or otherwise, or conspiracy, as well as by contract or agreement, having those effects on the competitive system and on purchasers and consumers of goods or services which were characteristic of restraints deemed illegal at common law, and they gave both private and public remedies for the injuries flowing from such restraints.

That such is the scope and effect of the Sherman Act was first judicially recognized and expounded in the classic opinion in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, affirmed 175 U.S. 211, written by Judge, later Chief Justice, Taft, and concurred in by Justice Harlan and Judge, later Justice, Lurton, of this Court. This Court has since repeatedly recognized that the restraints at which the Sherman law is aimed, and which are described by its terms, are only those which are comparable to restraints deemed illegal at common law, although accomplished by means other than contract and which, for constitutional reasons, are confined to transactions in or which affect interstate commerce.

• • •

In thus grounding the 'rule of reason' upon the analogy of the common law doctrines applicable to illegal restraints of trade the Court gave a content and meaning to the statute in harmony with its history and plainly indicated by its legislative purpose. Labor cases apart, which will presently be discussed, this Court has not departed from the conception of the Sherman Act as affording a remedy, public and private, for the public wrongs which flow from restraints of trade in the common law sense of restriction or suppression of commercial competition. In the cases considered by this Court since the *Standard Oil* case in 1911 some form of restraint of commercial competition has been the sine qua non to the condemnation of contracts, combinations or conspiracies under the Sherman Act, and in general restraints upon competition have been condemned only when their purpose or effect was to raise or fix the market price. It is in this sense that it is said that the restraints, actual or intended, prohibited by the Sherman Act are only those which are so substantial as to affect market prices. Restraints on competition or on the course of trade in the merchandising of

articles moving in interstate commerce is (sic) not enough, unless the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition. (Citations omitted.)

• • •

Here it is plain that the combination or conspiracy did not have as its purpose restraint upon competition in the market for petitioner's product. Its object was to compel petitioner to accede to the union demands and an effect of it, in consequence of the strikers' tortious acts, was the prevention of the removal of petitioner's product for interstate shipment. So far as appears the delay of these shipments was not intended to have and had no effect on prices of hosiery in the market, and so was in that respect no more a restraint forbidden by the Sherman Act than the restriction upon competition and the course of trade held lawful in *Appalachian Coals v. United States, supra,* because notwithstanding its effect upon the marketing of the coal it nevertheless was not intended to and did not affect market price."[31]

Radovich v. National Football League, 9 Cir., 1956, 231 F.2d 621, was a pleading case. In it, this Court decided on two grounds that plaintiff's complaint did not state a cause of action. The first ground was that football was more like baseball *(Toolson v. New York Yankees,* 1953, 346 U.S. 356; *Federal Baseball of Baltimore v. National League,* 1922, 259 U.S. 200) than like boxing *(United States v. International Boxing Club,* 1955, 348 U.S. 236). Secondly, if wrong on the first premise, then Radovich's complaint did not "allege facts from which it can be determined as a matter of law that by reason of intent, tendency, or the inherent nature of the contemplated acts, the conspiracy was reasonably calculated to prejudice the public interest by unduly restricting the free flow of interstate commerce," quoting from *Fedderson Motors v. Ward,* 10 Cir., 1950, 180 F.2d 519, 522.

Radovich alleged that there was a conspiracy to eliminate football leagues not affiliated with the defendant, hence, defend-

[31]Id. at 497-502.

ants were creating a monopoly. The method alleged was to control the players by the "reserve clause" and "black-lists." The alleged intent of the defendants in *Radovich* was to "boycott and ruin defendant's competitor, the All-America Conference." This Court concluded that the means alleged were not calculated to prejudice the public or unreasonably restrain interstate commerce. This Court failed "to discover any basis to say that the appellant has pleaded that All-America or any other league was ruined, would be ruined or substantially affected by the complained of acts," and therefore felt there were no facts pleaded leading to the conclusion that the public had been adversely affected.

The Supreme Court (352 U.S. 445) considered both grounds relied on by this Court to affirm the District Court and found them untenable. We are not concerned here with the Supreme Court's refusal to approve this Court's conclusion as to the similarity between football and baseball. But appellant herein strongly relies upon the pronouncement of the Supreme Court with respect to the second point: public injury. After disposing of the essential allegations of the substantial effect upon interstate commerce, the Supreme Court said:

> "We find the technical objections to the pleading without merit. The test as to sufficiency laid down by Mr. Justice Holmes in *Hart v. B. F. Keith Vaudeville Exchange*, 262 U.S. 271, 274 (1923), is whether 'the claim is wholly frivolous.' While the complaint might have been more precise in its allegations concerning the purpose and effect of the conspiracy, 'we are not prepared to say that nothing can be extracted from this bill that falls under the Act of Congress . . .' Id., at 274."[32]

The Court then cites *United States v. Employing-Plasterers Association, supra*, which again is a pleading case.

The Supreme Court then states:

> "Petitioner's claim need only be 'tested under the Sherman Act's general prohibition on unreasonable restraints of trade,' *Times-Picayune Pub. Co. v. U.S.*, 345 U.S. 594, 614 (1953), and meet the requirement that petitioner has thereby suffered

[32]**Radovich v. National Football League**, 1957, 352 U.S. 445, 453.

injury. Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public 10/ and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. These laws protect the victims of the forbidden practices as well as the public."[33]

The Supreme Court, by Note 10 and reference to its earlier decision in *Apex*, defines what it means by "prohibited activities injurious to the public" and what the "forbidden practices" are from which the public is to be protected. Note 10 reads as follows:

"In *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940), this Court said: 'The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of the purchasers or consumers of goods and services, *all of which had come to be regarded as a special form of public injury*,' (Emphasis supplied.) Id., at 493."[34]

To further emphasize the restriction to free competition to which it referred, the Supreme Court continued its Note 10 as follows:

"In *Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20 (1912), speaking of the antitrust laws the Court said: '*The law is its own measure of right and wrong*, of what it permits, or forbids, and *the judgment of the courts cannot be set up against it* in a supposed accommodation of its policy with the good intention of parties, and it may be, of some good results.' (Emphasis supplied.) Id., at 49."[35]

We take it that by this Note the Supreme Court admonishes the inferior courts not to come to their own philosophical conclusions as to what restraints of trade should be prohibited, con-

[33]Ibid. 454.

[34]It is to be noted that the emphasis supplied in the foregoing quotation by the Supreme Court of its earlier decisions in **Apex**, was supplied by that Court, not by this Court.

[35]The three-judge dissent in **Radovich** is of no materiality here, because it is based upon the appropriate compulsions of **stare decisis**, and the binding effect of the **Toolson** case.

trary to the language of a statute which was constituted and adopted with recognition of the existing rules of common law. We cannot say what we may think it should be because of personal antitrust philosophy or predilection.

Times-Picayune Pub. Co. v. United States, 1953, 345 U.S. 594, is cited in *Radovich,* 352 U.S. at 453, as setting up the tests by which any wholly non-frivolous claim of a plaintiff is to be tested.

In *Times-Picayune* the District Court had denied the government's motion for summary judgment which had urged that "the unit contracts" therein under attack were per se violations of §1 of the Sherman Act. But after trial the District Court found that the defendants had instituted the unit contract system "in order to 'restrain general and classified advertisers from making an untrammeled choice'" between two competing papers "'in purchasing advertising space, and also to substantially diminish the competitive vigor of'" the opposing paper, and that this unit system was "economically enforceable against (advertising) buyers solely because of the Times-Picayune's 'dominant' or 'monopoly position.'"[36]

The Supreme Court, reviewing these findings, then related how the District Court had held §1 of the Sherman Act violated; that "tying arrangements" depended upon the market setting; and, that in the market setting found by the Supreme Court, "we do not think that the Times-Picayune occupied a 'dominant' position in the newspaper advertising market in New Orleans."[37] It was therefore necessary for the Supreme Court to test the advertising contracts under attack

> ". . . under the Sherman Act's general prohibition on unreasonable restraints of trade. For purposes of §1, '[a] restraint may be unreasonable either because a restraint otherwise reasonable is accompanied with a specific intent to accomplish a forbidden restraint or because it falls within the class of restraints that are illegal per se.' *United States v. Columbia Steel Co.,* 334 U.S. 495, 522 (1948). Since the

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[36]**Times-Picayune v. United States,** 1953, 345 U.S. 594, 601.

[37]*Id.* at 611.

requisite intent is inferred whenever unlawful effects are found, *United States v. Griffith*, 334 U.S. 100, 105, 108 (1948); *United States v. Patten*, 226 U.S. 525, 543 (1913), and the rule of *International Salt* is out of the way, the contracts may yet be banned by §1 if unreasonable restraint was either their object or effect. . . . For our inquiry to determine reasonableness under §1 must focus on 'the percentage of business controlled, the strength of the remaining competition [and] whether the action springs from business requirements or purpose to monopolize.' 334 U.S., at 527; compare *Standard Oil Co. of California v. United States*, 337 U.S. 293, 312-313 (1949)."[38]

Mr. Justice Clark then treats the factual situation disclosed by the evidence, finds the advertising contracts were the results of endeavors to "rationalize" operations; were legitimate business aims; were not conceived to achieve monopolistic ends; were at least partially induced by competitive business considerations and "did not bespeak a purposive quest for monopoly or restraint of trade."[39]

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[38]Id. at 614-615.

[39]Id. at 623.

"Consequently, no Sherman Act violation has occurred unless the Publishing Company's refusal to sell advertising space except en bloc, viewed alone, constitutes a violation of the Act. Refusals to sell, without more, do not violate the law. Though group boycotts, or concerted refusals to deal, clearly run afoul of §1, **Kiefer-Stewart Co. v. Seagram & Sons**, 340 U.S. 211, 214 (1951); **Associated Press v. United States**, 326 U.S. 1 (1945); see **United States v. Columbia Steel Co.**, 334 U.S. 495, 522 (1948), different criteria have long applied to qualify the rights of an individual seller. Beginning with **United States v. Colgate & Co.**, 250 U.S. 300 (1919), this Court's decisions have recognized individual refusals to sell as a general right, though 'neither absolute nor exempt from regulation.' **Lorain Journal v. United States**, 342 U.S. 143, 155 (1951). If accompanied by unlawful conduct or agreement, or conceived in monopolistic purpose or market control, even individual sellers' refusals to deal have transgressed the Act. **Lorain Journal v. United States, supra**; **United States v. Bausch & Lomb Optical Co.**, 321 U.S. 708, 721-723 (1944); **Eastman Kodak Co. v. Southern Photo Materials Co.**, 273 U.S. 359, 375 (1927); **United States v. Schrader's Son, Inc.**, 252 U.S. 85, 99 (1920); cf. **American Tobacco Co. v. United States**, 328 U.S. 781, 808 (1946); **Federal Trade Commission v. Beech-Nut Packing Co.**,

This case, to us, holds that "restraints of trade," as that language is used in the Sherman Act means "unreasonable" restraints of trade, and "unreasonable restraints of trade" are (1) illegal per se restraints interfering with free competition in business and commercial transactions which tend to (a) restrict production; (b) affect prices; or, (c) otherwise control the market to the detriment of the purchasers or consumers of goods and services, or (2) those restraints of trade, ordinarily reasonable, but made unreasonable because accompanied with a specific intent to accomplish the equivalent of a forbidden restraint.

Applying these tests to the instant facts we must ask:

(1) What is *the restraint* relied upon?

(2) Is the restraint *illegal per se*?

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257 U.S. 441, 453-455 (1922). Still, although much hedged about by later cases, **Colgate's** principle protects the Times-Picayune Publishing Company's simple refusal to sell advertising space in the Times-Picayune or States separately unless other factors destroy the limited dispensation which that case confers.

In our view, however, no additional circumstances bring this case within §1. . . . With the advertising contracts in this proceeding viewed as in themselves lawful and no further elements of combinations apparent in the case, §2 criteria must become dispositive here.

An insufficient showing of specific intent vitiates this part of the Government's case. While the completed offense of monopolization under §2 demands only a general intent to do the act, 'for no monopolist monopolizes unconscious of what he is doing,' a specific intent to destroy competition or build monopoly is essential to guilt for the mere attempt now charged. **United States v. Aluminum Co. of America,** 148 F.2d 416, 431-432 (1945); **United States v. Griffith,** 334 U.S. 100, 105 (1948); **American Tobacco Co. v. United States,** 328 U.S. 781, 814 (1946); **Swift & Co. v. United States,** 196 U.S. 375, 396 (1905). This case does not demonstrate an attempt by a monopolist established in one area to nose into a second market, so that past monopolistic success both enhances the probability of future harm and supplies a motivation for further forays. **Cf. United States v. Griffth, supra; Swift & Co. v. United States, supra. And unlike Lorain Journal v. United States,** 342 U.S. 143 (1951), where a single newspaper's refusal to sell space to advertisers unless they forewent advertising over a competing local radio station manifested 'bold, relentless, and predatory commercial behavior,' **id.,** at 149, no remotely comparable charge is borne out here. • • •

We conclude, therefore, that this record does not establish the charged violations of §1 and §2 of the Sherman Act." **Id.** at 624-627.

(3) If not, *(i.e.,* if an otherwise reasonable restraint) is it accompanied with *a specific intent to accomplish a forbidden restraint?*

(4) Was the *object* of the contract or combination under attack an *unreasonable restraint?*

(5) Was the *effect* of the contract under dispute an *unreasonable restraint?*

Times-Picayune further suggests, that in determining what constitutes an *"unreasonable restraint"* (either sought by or resulting from defendants' acts), we must determine (a) the percentage of business controlled; (b) the strength of the remaining competition; (c) whether the action criticized was the result of business requirements or done with a purpose to monopolize.

Here the restraint relied on; as we see from the complaint,[40] was in preventing plaintiff from obtaining *certain* electrical appliances for resale, while at the same time permitting Broadway-Hale to purchase those *certain* electrical appliances. This is a simple refusal to sell, allegedly by joint action. Various other competing electrical appliances were shown by the record before the trial court to be available to Klor's, Inc.[41] Many other retailers sold these "certain electrical appliances" to the public, fifty-three in the Mission District of San Francisco alone. The number of retailers in San Francisco from the start of the alleged conspiracy to the time of filing suit increased.

There was no charge or proof that by any act of defendants the price, quantity, or quality offered the public was affected, nor that there was any intent or purpose to effect a change in, or an influence on, prices, quantity, or quality, either directly or indirectly. It is not suggested that either the object or effect of the alleged conspiracy was to create an unreasonable restraint, illegal per se.

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[40]Tr. p. 8, para. III.

[41]Twenty competing brands of television sets compared to the seven declared impossible to attain; eighteen competing brands of refrigerators, compared to three; twenty-three stoves, compared to five; thirty competing clothes washers and dryers, compared to two. See Statement of Facts, **supra.**

If a business transaction and the effect and object of such transaction between two or more persons is lawful, then the transaction cannot be nor can it create an unlawful conspiracy. If "X Company," a manufacturer, refuses to sell to Klor's, Inc., and sells to "Y Company", a retailer who also agrees to buy from "X" as long as "X" does not sell to Klors, more than one person is involved, and they have agreed not to sell, but their act is not necessarily[41a] illegal. To a minute degree, any refusal to sell is a restraint of trade, in the ordinary sense; but it is not necessarily a restraint in the Sherman Act sense. Some restraints of trade are reasonable, and hence not violative. Others are not in, nor do they affect, interstate commerce, and hence are not violative. Others are so remote in their effect on the public at large as not to be restraints for Sherman Act purposes. *Apex Hosiery v. Leader, supra; Eastern States Lumber Dealers Association v. United States*, 1914, 234 U.S. 600; *Miller Motors v. Ford Motor Co.*, 4 Cir., Jan. 20, 1958, ... F.2d ....., affirming, 149 F.Supp. 790 (1957); *Hudson Sales Corp. v. Waldrip*, 5 Cir., 1954, 211 F.2d 268; *Fedderson Motors v. Ward, supra; Westmoreland Asbestos Co. v. Johns-Manville Corp.*, 2 Cir., 1943, 136 F.2d 844.

The purpose of the antitrust statutes is to protect the "public" from the harm which follows from concerted or monopolistic conduct designed to acquire control of a market, usually competitive, to which the public must ultimately resort and which conduct can be described as an undue restraint of trade.[42] Notwithstanding the many phrases which may be picked at random out of numerous cases, and, out of context, be made to support the position that concerted conduct directed at harming the opportunity of a single trader to compete is always within the prohibitions of the Sherman Act, it is our opinion that there exists the

[41a] See the "simple example" suggested by Mr. Justice Black in **Northern Pacific Railway Co. v. United States, supra,** at 653:

> "[I]f one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself."

[42] **Wilder Mfg. Co. v. Corn Products Refining Co.**, 1915, 236 U.S. 165, 174; **Eastern States Lumber Dealers Ass'n v. United States**, 1913, 234 U.S. 600.

need to show facts in a motion such as this from which a court might reasonably infer "public injury" before an antitrust violation is before the court; and, further, that the Supreme Court has not departed one whit from this requirement.

Where the particular conduct in restraint of trade is of the kind prohibited by the Act and where the inference of public injury reasonably can be extracted from the complaint, a good cause of action is stated. Assuming these conditions are met, a private plaintiff has the right to bring an action for treble damages for injury to his business or property "by reason of anything forbidden in the antitrust laws (Title 15, U.S.C. §15) and for an injunction." (Title 15, U.S.C. §26.) However, the private right is not a remedy for a private wrong created by federal law. The private right is a method of enforcing public rights and thereby providing additional means of enforcing the prohibitions of the statute. "Congress . . . has provided sanctions allowing private enforcement of antitrust laws by an aggrieved party." *(Radovich v. National Football League, supra* at 454.) In this way it is entirely accurate to assert that "these laws protect the victim of the forbidden practice as well as the public." *(Ibid.)* But the private right is a purely incidental means of enforcing the Act. Before there can be any "forbidden practices" there must be an improper restraint of trade or commerce; once this is established or reasonably put in issue, the private right and the consequent private protection arise. Without the prohibited restraint, there is no private right for there has been no violation, i.e., there has been no conduct of defendants, which is or conceivably could be injurious to the public welfare. Plaintiff must allege (and here prove) that there has been a prohibited restraint and that he has been proximately damaged thereby in order to sustain his complaint or position against a motion to dismiss or for summary judgment. He need not allege, additionally, that the public has been injured by defendants' conduct. But to have the prohibited restraint there must be facts from which it can be determined that the "conduct charged . . . was reasonably calculated to prejudice the public interest by unduly restricting the free flow of commerce." *(Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 5 Cir., 1954, 214 F.2d 891.) The Supreme Court in *Radovich*, relied on so heavily by plaintiff, said no more than this in quoting

Justice Holmes' conclusion in *Hart v. B. F. Keith Vaudeville Exchange*, 1923, 262 U.S. 271, 274:

> "It is enough (for purposes of motion to dismiss) that we are not prepared to say that nothing can be extracted from this bill that falls under the Act of Congress, or at least that the claim is wholly frivolous."

Turning now to the cases cited to us by plaintiff, we are unable to discern any deviation from what we have just stated. Plaintiff asserts that the case of *Shotkin v. General Electric Co.*, 10 Cir., 1948, 171 F.2d 236, established a new requirement for private antitrust litigation: that plaintiff is required to allege injury to the public in order to state a cause of action. We are unable to find any such requirement in *Shotkin*. In affirming the granting of a motion to dismiss, Judge Bratton, speaking for the Court, said:

> "Founded upon these broad concepts of public policy, the Act is limited in operative scope and effect to combinations, agreements, or concerts which tend to prejudice the public interest by unduly restricting competition or unduly obstructing the due course of trade, or which because of their evident purpose or inherent nature injuriously restrain trade in the competitive markets.
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> • • •
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> It is essential to recovery in an action of this kind that plaintiff allege and prove two things: a violation of the Act, and damages to plaintiff proximately resulting from the acts and conduct of the defendants which constitute the violation of the Act. Injury to the plaintiff, of itself and alone, is not sufficient to warrant a civil action of this nature for injunctive relief and damages. There must be harm to the general public in the form of undue restriction of trade and commerce as a result of the wrongful contract, combination, or concert.
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> • • •
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> In other words the complaint failed to allege facts from which it could be determined as a matter of law that a combination or conspiracy was entered into which brought about an increase in prices to the consuming public, a diminution

in the volume of merchandise in the competitive markets, a deterioration in the quality of merchandise available in the channels of commerce, or other like evil consequence in the free flow of interstate commerce."[43]

We are unable to discern any new doctrine in the above extract. It seems to be no more than a concise and accurate statement of well-established requirements for private recovery under the antitrust provisions.

It is true that on a motion for dismissal the complaint is to be broadly interpreted in a manner most favorable to the pleader;[44] but that does not mean that the court must find allegations of ultimate facts in conclusionary pleading, or a violation of the Sherman Act from allegations of action directed solely at plaintiff and which, as such, could have as a matter of law no conceivable effect on the competitive market.

Similarly with *Fedderson Motors v. Ward, supra*, which plaintiff argues continued the "new requirement" of public injury supposedly injected by *Shotkin. Fedderson* also is a case where, on affirming a judgment dismissing the complaint, the court was unable to find any allegation of material fact evidencing an antitrust violation.

The Supreme Court in *Radovich v. National Football League, supra*, termed controlling of this case by plaintiff, did not, in our opinion, in any way overrule these cases. The Court in *Radovich* did no more than to re-assert Justice Holmes' admonition that the test of sufficiency of the complaint is whether "the claim is wholly frivolous." *(Id.* at 453.) In reversing this Court the Supreme Court determined that the allegation of defendants' attempt to eliminate from competition the All-America Conference, defendants' *only* competitor in professional football, which thereby caused injury to the plaintiff in his business or property, was sufficient to sustain the complaint against a motion to dismiss for failure to state a cause of action under the antitrust laws. Read

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[43]171 F.2d, at 238-239.

[44]**Radovich v. National Football League, supra; William Goldman Theatres, Inc. v. Twentieth Century Fox,** E.D.Pa., 1957, 151 F.Supp. 840.

thus, the *Radovich* case is entirely consistent with *Shotkin, Fedderson,* and all other cases in which the Supreme Court and the lower federal courts have adhered to the requirement that a violation of the Sherman Act requires conduct of defendants by which the public is or conceivably may be ultimately injured.[45]

Plaintiff cites us many cases involving group boycotts, discrimination, and the use of large scale buying power to drive out a competitor. And he supplies us with many quotations which at first blush appear to support his position. But each of his authorities involves factual situations entirely different from the one before us; factual situations in which the random phrases picked by plaintiff are proper and not inaccurate; they do not, however, support the contentions made here.

We are told that the antitrust laws are a trader's statute and cited to *Mandeville Farms v. Sugar Co.,* 1948, 334 U.S. 219; but that case holds that the antitrust statute "does not confine its protection to purchasers, to competitors or to sellers." *(Id.* at 236.). The statute, so *Mandeville Farms* decides, includes protection against the anti-competitive conduct of *buyers* also. But the reason for such protection, is as always, fear of the detrimental effect on the public which these practices may have. In holding that concerted action by processors directed against growers is barred by the antitrust laws, the Court did not intend such a phrase as protection of "all who are made victims of the forbidden practices" *(Id.* at 236) to be used to create a cause of action for a single competitor injured by action directed solely at him which has no substantial effect on competition. Where there is no conceivable way in which a substantial segment of the public can be injured by the conduct attached, the Sherman Act is not violated. *(Apex Hosiery v. Leader, supra.)* The *Mandeville Farms* case is in no way contrary. It is not authority for the proposition that conduct directed solely and exclusively at an individual competitor is illegal, unless the result is a substantial lessening of competition in the particular market involved.[46]

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[45]See **Mandeville Farms v. Sugar Co.,** 1948, 334 U.S. 219; **Apex Hosiery v. Leader, supra,** Report of the Attorney General's National Committee to Study the Antitrust Laws 12 (1955).

[46]See **International Salt Co. v. United States,** 1947, 332 U.S. 392, 396.

In each of the "Theatre" cases relied on by plaintiff, defendants' conduct either did or was intended to eliminate the sole competitor in a particular market, was directed at one of a very small number of competitors,[47] or involved the use of large scale monopolistic power derived from nationwide enterprises to eliminate a competitor and thereby substantially affect competition in the local market area. (See, *e.g., United States v. Schine Chain Theatres,* 1948, 334 U.S. 110; *United States v. Griffith,* 1948, 334 U.S. 100; *Bigelow v. RKO Radio Pictures,* 1946, 327 U.S. 251; *Binderup v. Pathe Exchange,* 1923, 263 U.S. 291; *Hart v. B. F. Keith Vaudeville Exchange, supra; Paramount Film Distributing Corp. v. Village Theatre,* 10 Cir., 1955, 228 F.2d 271; *William Goldman Theatres v. Loew's, Inc.,* 3 Cir., 1945, 150 F.2d 738; *White Bear Theatre Corp. v. State Theatre Corp.,* 8 Cir., 1942, 129 F.2d 600; *Victor Talking Machine v. Kemeny,* 3 Cir., 1921, 271 F. 810.

Finally to be considered are those cases cited to us in which price fixing or some other form of complete market control was involved and where defendants' conduct was directed at a particular class of persons of which plaintiff was one. Here again it is clear that control or attempted control of all competitors is the evil which causes the contracts, combinations, or conspiracies to be the type prohibited by §1 of the statute. These cases are not here applicable; the conduct involved either was intended to control the entire market and was directed at plaintiff because he refused to conform or was directed at an entire class of defendants' competitors, buyers, or sellers, one of whom was the plaintiff. (See, *e.g., Radovich v. National Football League, supra; Kiefer-Steward v. Seagram & Sons,* 1951, 340 U.S. 211; *International Salt Co. v. United States,* 1947, 332 U.S. 392; *Fashion Guild v. FTC,* 1941, 312 U.S. 457; *Flintkote v. Lysfjord,* 9 Cir., 1957, 246 F.2d 368; *United States v. Tarpon Springs Sponge Exchange,* 5 Cir., 1944, 142 F.2d 125; *Package Closure Corp. v. Sealright Co.,* 2 Cir., 1944, 141 F.2d 972; *Roseland v. Phister,* 7 Cir., 1942, 125 F.2d 417; *Johnson v. J. H. Yost Lumber Co.,* 8 Cir., 1941, 117 F.2d 53.) Not one of the out of context quota-

[47]Removal of any one competitor thereby having a substantial effect on competition.

tions from the foregoing cases used by plaintiff will support his position when read within its factual setting.

Count one of the complaint, with which we are here solely concerned, alleges, in paragraph six, that defendant Broadway-Hale, in combination with each of the manufacturing-distributing defendants, prevented *plaintiff* from obtaining products to sell to the public. There is no allegation of actual, attempted, or intended control of the market in which plaintiff and defendant Broadway-Hale competed, considering the market to be either the retail sellers of the Mission District of San Francisco, the city itself, or the purchasing public. Defendants' affidavits, submitted under the provisions of Rule 56 of the Federal Rules, as well as the facts of which this Court may take judicial notice leave no doubt that the conduct directed at this particular plaintiff and only at this plaintiff did not and could not have under the circumstances any substantial effect on market competition. As defendants point out there are literally hundreds of dealers in the San Francisco Bay Area dealing in the same kinds and brands of major appliances as plaintiff and defendant Broadway-Hale. On Mission Street, along with the plaintiff and Broadway-Hale, there are over forty retail dealers. Additionally, there are numerous brands of appliances to which plaintiff was not denied access and which compete favorably with those he was denied.[48] In light of our previous discussion, such allegations, especially when considered on motion for summary judgment rather than on motion for dismissal of the complaint, do not allege facts from which it can be inferred that there was or may be a substantial effect on competition, and therefore do not allege a violation of §1 of the antitrust laws—they do not state facts from which injury to the public can be perceived.

The first sentence of paragraph six of count one of plaintiff's complaint is of no assistance to appellant. It alleges only that "defendants . . . have restrained trade and commerce . . . by contracting, combining, and conspiring together . . . in restraint and monopoly of such trade and commerce . . . and have thereby substantially lessened, limited and restrained competition in said

[48]See the Supreme Court's discussion of the effect of competing alternatives on alleged antitrust violations in **Times-Picayune v. United States, supra.**

trade and commerce. . . ." This is no more than the pleader's conclusion that defendants have restrained trade and commerce by restraining trade and commerce. It states no facts from which illegal action can be perceived or inferred. Paragraph eight of count one speaks of Broadway-Hale's "monopolistic buying power" enjoyed "by reason of the large number of retail outlets it operates." But the essence of this allegation is that Broadway-Hale "has purchased and continues to purchase the products of the manufacturer-distributor defendants upon the condition that the manufacturer-distributor defendants do not sell their products to the plaintiff." We find no basis for determining that Broadway-Hale intended, or had the power if it so intended, to effect such conditions on its purchases in such scope as to appreciably affect competition among retailers generally in their purchases or sales to the public. It is well known that appliance sales are within a most highly competitive market. As between two dealers, one may be able to condition his purchases by requiring no sales to the other. So long as the ability to so condition one's own purchases does not substantially interfere with either the "retailing public" or the "consuming public," there is no conduct which violates the provisions of the antitrust laws.

In determining whether certain conduct was "in restraint of trade or commerce," we re-emphasize what was said by the Court in *Apex Hosiery v. Leader, supra,* at 493, 500:

> "The end sought (by the Sherman Act) was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or *otherwise* control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury. • • •
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> . . . [R]estraints, actual or intended, prohibited by the Sherman Act are only those which are so substantial as to affect market prices. Restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce is (sic) not enough, unless the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition." [Emphasis added.]

In other words, restraints, in order to be violative of the law, must operate, or be intended to operate, to restrict commercial competition in a *substantial* manner.

We believe this to be an accurate and controlling statement of the law applicable in determining whether particular conduct conceded to exist does or does not constitute a violation of the antitrust laws. Neither *Shotkin v. General Electric Co., supra,* and *Fedderson Motors v. Ward, supra,* nor the cases which follow and rely on them are to the contrary; nor does *Radovich v. National Football League, supra,* weaken or limit the conclusions derived from the *Apex* case.

We hold, therefore, that plaintiff's first cause of action, as proved, is fatally defective. The facts prove no more than a squabble between two of many competitors in a highly competitive market area. The facts prove no conduct in violation of the antitrust laws because there has been no conduct by which the "public" could conceivably suffer injury. Construing the complaint and affidavits together, and considering the facts judicially known to this Court and the court below, the motion for summary judgment was properly granted.

The judgment is *affirmed.*

(Endorsed:) Opinion. Filed. Mar. 28, 1958.

Paul P. O'Brien, Clerk.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,380

Klor's, Inc.,
Appellant,

vs.

Broadway-Hale Stores, Inc., et al.,
Appellees.

JUDGMENT

Appeal from the United States District Court for the Northern District of California, Southern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted:

On Consideration Whereof, It is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment.

Filed and entered: March 28, 1958.
Paul P. O'Brien, Clerk.

Appendix C

Sherman Act, Section 1, July 2, 1890, Chap. 647, Sec. 1, 26 Stat. 209, 15 U. S. Code, Sec. 1:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . ."

Section 2, Sherman Act, July 2, 1890, Chap. 647, Sec. 2, 26 Stat. 209, 15 U.S. Code, Sec. 2:

"Section 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

Section 4 of the Clayton Act, October 15, 1914, Chap. 323, Sec. 4, 38 Stat. 731, 15 U. S. Code, Sec. 15:

"Section 4. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Federal Rules of Civil Procedure, Rule 56. Summary Judgment.

(a) *For Claimant.* A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. As amended Dec. 27, 1946, effective March 19, 1948.

(b) *For Defending Party.* A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) *Motion and Proceeding Thereon.* The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. As amended Dec. 27, 1946, effective March 19, 1948.

(d) *Case Not Fully Adjudicated on Motion.* If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) *Form of Affidavit; Further Testimony.* Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) *When Affidavits Are Unavailable.* Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present

by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) *Affidavit Made in Bad Faith.* Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

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Office Supreme Court, U.S.
FILED
JUN 27 1958
JOHN T. FEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1958

No. [redacted] 76

KLOR'S, INC.,

Petitioner,

vs.

BROADWAY-HALE STORES, INC., ADMIRAL CORPORATION, ADMIRAL DISTRIBUTERS, INC., ZENITH RADIO CORPORATION, WHIRLPOOL SEEGER CORPORATION, H. R. BASFORD COMPANY, RADIO CORPORATION OF AMERICA, LEO J. MEYBERG COMPANY, EMERSON RADIO AND PHONOGRAPH CORPORATION, JEFFERSON-TRAVIS, INC., PHILCO CORPORATION, PHILCO DISTRIBUTORS, INC., RHEEM MANUFACTURING COMPANY, GENERAL ELECTRIC COMPANY, GENERAL ELECTRIC DISTRIBUTING CORPORATION, OLYMPIC RADIO AND TELEVISION, INC., OLYMPIC TELEVISION OF NORTHERN CALIFORNIA, TAPPAN STOVE COMPANY, O'KEEFE & MERRITT COMPANY,

Respondents.

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 1038

KLOR'S, INC.,

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vs.

BROADWAY-HALE STORES, INC., ADMIRAL CORPORATION, ADMIRAL DISTRIBUTERS, INC., ZENITH RADIO CORPORATION, WHIRLPOOL SEEGER CORPORATION, H. R. BASFORD COMPANY, RADIO CORPORATION OF AMERICA, LEO J. MEYBERG COMPANY, EMERSON RADIO AND PHONOGRAPH CORPORATION, JEFFERSON-TRAVIS, INC., PHILCO CORPORATION, PHILCO DISTRIBUTORS, INC., RHEEM MANUFACTURING COMPANY, GENERAL ELECTRIC COMPANY, GENERAL ELECTRIC DISTRIBUTING CORPORATION, OLYMPIC RADIO AND TELEVISION, INC., OLYMPIC TELEVISION OF NORTHERN CALIFORNIA, TAPPAN STOVE COMPANY, O'KEEFE & MERRITT COMPANY,

Respondents.

Brief for Respondents in Opposition

OPINION BELOW

The opinion of the Court of Appeals has not yet appeared in the Federal Reporter but is reported at 1958 Trade Cases, Para. 69,007, and is quoted in an appendix to the petition.

JURISDICTION

The judgment of the Court of Appeals was entered on March 28, 1958.[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Sherman Act, §§ 1 and 2; Act of July 2, 1890, c. 647, §§ 1 and 2, 26 Stat. 209, as amended July 7, 1955, c. 281, 69 Stat. 282.

Sec. 1:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *"

Sec. 2:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *."

Clayton Act, § 4; Act of October 15, 1914, c. 323, § 4, 38 Stat. 731:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

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1. Erroneously stated as May 28 in the petition (p. 2).

QUESTION PRESENTED

The petition (p. 2) erroneously states that the question presented is whether a single trader injured by conduct forbidden by the Sherman Act may recover. Of course, the answer to such a question has always been yes. The actual question is whether the conduct complained of *was forbidden*, i.e., whether the alleged conspiracy was one in "restraint of trade" within the meaning of the Sherman Act or merely a private controversy for resolution in state courts under state law. Specifically, the question is this:

Where respondent retailer conditioned its purchase of certain brands of household appliances on willingness of respondent suppliers not to sell those brands to petitioner, a retailer next door who is but one of over 40 in the neighborhood and of hundreds if not thousands in the city, is an alleged conspiracy to refrain from selling those brands to petitioner, not aimed at a class of persons but at him alone, not aimed at any other retailer, not intended to have and not in fact having any effect on prices, on the availability of any product to the public or on the quality thereof, or on the availability to petitioner of innumerable competing brands, without any monopoly involved or possibility thereof, with no injury whatever to the public intended or effected, a violation of the Sherman Act?

PRELIMINARY STATEMENT

The petition involves no novel question. The kind of case it presents has been decided frequently, and without exception it has been held that no claim exists under the Sherman Act. The decision is not in conflict with that of any other court of appeals and applies principles repeatedly announced by this Court. It accords with the recent observa-

tion in *Northern Pacific Railway Co. v. United States* (1958), 356 U.S. 1, 7, that

> "if one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself."

STATEMENT OF THE CASE

Petitioner is one of over 40 household appliance stores located within 11 blocks on Mission Street in San Francisco (R. 5; Def. Ex. A, R. 146) and one of "literally hundreds of dealers in the San Francisco Bay Area" (Pet. App. 30,[2] R. 25-43). Respondent Broadway-Hale Stores, Inc. (hereafter called Hale) is another retailer, with a store a few doors away (R. 5). The other 18 respondents are 10 manufacturers and 8 distributors of 10 brands of appliances.

Petitioner sued under the Robinson-Patman Act and section 4 of the Clayton Act by a complaint containing 41 counts, charging conspiracy and discrimination in prices and services.

As a result of a pre-trial conference it was stipulated and ordered that regardless of its allegations Count One should be deemed amended to seek relief solely under the Sherman Act, and the Robinson-Patman claims were relegated to the other 40 counts (R. 20; 142-144; Pet. App. 6). A series of orders then ensued under Rule 42(b) of the Federal Rules of Civil Procedure "by virtue of which Count One of the complaint and the claim for relief tendered thereby are to be treated in all respects as if they constituted a separate action" (R. 135). What followed concerned Count One alone, leaving petitioner with its other 40 counts still pending in

2. "Pet. App." refers to the opinion of the court of appeals appearing in the appendix to the petition.

the District Court upon which it was free to urge its claims of discrimination.

Count One thus became a simple charge that Hale declined to buy from respondent suppliers if they also sold to petitioner (a "next-door" competitor) and that as a result those suppliers "conspired" not to sell their brands to petitioner. It did not charge that the alleged conspiracy was aimed at market competition or at a class of persons but at petitioner alone, nor did it charge that the alleged conspiracy was either intended to or did have any effect on prices, retail or wholesale, on the availability of any product to the public or on the quality thereof, or on the availability to petitioner himself of innumerable competing brands.

Respondents first moved to dismiss Count One for failure to state a claim for relief. But in view of decisions that on a motion to dismiss the allegations of the complaint are to be liberally construed, whereas, if the case lacks merit, "an expensive full dress trial can be avoided by invoking the summary judgment procedure under Rule 56,"[3] respondents asked that ruling be deferred. They then filed motions for summary judgment (R. 22, 128, 130, 132), supported by affidavits (R. 25-125). Petitioner offered no affidavit in opposition. Respondents' purpose in proceeding on a motion for a summary judgment rather than on the motion to dismiss was to permit the issue to be decided on undisputed fact rather than on inference or construction of the mere language of the pleader.[4]

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3. *United States v. Employing Plasterers Ass'n.* (1954), 347 U. S. 186, 189.

4. As the court below said (Pet. App. 7):

"It should be noted here that the court below did not rule on the pleadings nor grant the motion to dismiss by reason of any failure therein. While a motion to dismiss was made, it was apparently passed over so that the motion for summary judgment could be determined. That latter motion having been granted, it was necessarily dispositive of the motion to dismiss."

As the District Court observed, the motion presented "an undisputed factual situation" (R. 145). It granted the motion for summary judgment (R. 133-136), and the Court of Appeals affirmed unanimously in an opinion by Judge Stanley N. Barnes.

The "undisputed factual situation" upon which the case was decided is summed up in the opinion below thus (Pet. App. 11-13):

> "Appellant [Petitioner] and appellee Hale are not the only retailers of appliances in San Francisco. There are literally hundreds, if not thousands, of others (R. 25-27). The classified section of the San Francisco Telephone Directory contains 14 pages of listings (R. 29-43). In San Francisco alone are sold not only the brands of appliances involved in this case but many other competing brands (R. 26-27). In addition to the 7 brands of television sets, radio and phonographs mentioned in the complaint, there are 20 other competing brands sold in San Francisco. In addition to the three mentioned brands of refrigerators there are 18 other competing brands. In addition to the 5 mentioned brands of stoves, there are 23 competing brands; in addition to the 2 mentioned brands of clothes washers and dryers, there are 30 competing brands. Among these competing brands are many of the outstanding and most widely advertised brands in the country, including the names Capehart, Crosley, Du Mont, Hallicrafter, Hoffman, Magnavox, Motorola, Packard-Bell, Scott, Westinghouse, Amana, Bendix, Coldspot, Frigidaire, Hotpoint, International Harvester, Kelvinator, Norge, Servel, Chambers, Roper, Thermador, Western Holly (see listing at R. 26-27). Appellant does not charge that he was denied the right to handle any of this vast number of brands manufactured and sold by companies not parties to this action.
>
> "Moreover, a large number of other retailers sell to the San Francisco public the very brands referred to

in the complaint. At the date of filing suit the number of dealers *in San Francisco* handling these products was as follows: (see note 24.)

"In the *Mission District alone*, in San Francisco, there are 53 dealers selling the brands referred to in the complaint. Restricting the area under consideration even more narrowly, *to Mission street alone*, a member of the public desiring to purchase an appliance and strolling down Mission Street for a span of but 11 blocks, of which appellant's store is approximately in the center, would pass the shops of 43 retailers, selling the specific items and brands referred to in the complaint. * * *

"* * * while the alleged conspiracy is charged as having begun prior to 1952 (R. 9), the number of retail stores in San Francisco selling the items and brands referred to in the complaint steadily increased after 1952 and up to the time of the commencement of the suit. Admiral dealers increased from 150 to 195, and in the Mission District alone from 20 to 36; Zenith from 120 to 153; Whirlpool dealers from 40 to 47; Emerson from 40 to 109 and in the Mission District alone from 13 to 29; Philco from 79 to 175 and in the Mission District alone from 22 to 47; Wedgewood Stove dealers from 41 to 56 and from 8 to 9 in the Mission District alone; General Electric dealers and RCA have run into the hundreds for years and there have been no material variations."

"24

Admiral products	195 retailers	(R. 45)
Zenith products	153 retailers	(R. 48)
Whirlpool products	67 retailers	(R. 50)
RCA products	127 retailers	(R. 52)
Emerson products	109 retailers	(R. 54)
Philco products	175 retailers	(R. 58)
Rheem products	56 retailers	(R. 62)
GE products	110 retailers	(R. 66)
Olympic products	33 retailers	(R. 116)
Tappan products	13 retailers	(R. 118)
O'Keefe & Merritt products	65 retailers.	(R. 121)"

[Italics are in the original.]

In short, the essence of the charge as amplified and clarified by the undisputed showing is this. Petitioner is a retailer of certain commodities of which (a) a tremendous number of brands are in open competition with each other, and (b) innumerable retailers are openly competing with each other on the very brands mentioned in the complaint. Numerous competing brands not involved in the alleged conspiracy are available to petitioner,[5] and the brands involved are being sold by innumerable others. Both the commodities and the particular brands are as available to the public as they ever were; there are still "literally hundreds, if not thousands" of retail outlets to the public (Pet. App. 11). Further as the court below pointed out (Pet. App. 23):

> "There was no charge or proof that by any act of defendants the price, quantity, or quality offered the public was affected, nor that there was any intent or purpose to effect a change in, or an influence on, prices, quantity, or quality, either directly or indirectly."

The alleged conspiracy was not aimed at market competition, at any class of people, but at a single "next-door" retailer. It had no tendency to monopoly. Again, as the court said (Pet. App. 30):

> "There is no allegation of actual, attempted, or intended control of the market in which plaintiff and defendant Broadway-Hale competed, considering the market to be either the retail sellers of the Mission District of San Francisco, the city itself, or the purchasing public. Defendants' affidavits, submitted under the provisions of Rule 56 of the Federal Rules, as well as the facts of which this Court may take judicial notice leave no doubt that the conduct directed at this particular plaintiff and only at this plaintiff did not and could not have under

5. Although the petition refers to "elimination" of a trader, there was no charge that petitioner was eliminated, only that he was denied particular brands.

> the circumstances any substantial effect on market competition. * * * there are literally hundreds of dealers in the San Francisco Bay Area dealing in the same kinds and brands of major appliances as plaintiff and defendant Broadway-Hale."

While the complaint referred to monopoly and monopolization and the petition is replete with similar references (e.g., pp. 4, 5, 6, 9, 24), one of the purposes and accomplishments of the motion for summary judgment was to demonstrate that these were sham allegations. In view of the undisputed facts, not to speak of the judicial notice of the two courts concerning the very community in which those courts sit,[6] both courts below recognized without hesitation that no genuine issue on this subject was involved.

In conclusion the court of appeals observed (Pet. App. 32) that the record showed

> "no more than a squabble between two of many competitors in a highly competitive market area. * * * Construing the complaint and affidavits together, and considering the facts judicially known to this Court and the court below, the motion for summary judgment was properly granted."

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6. Among the innumerable other retailers handling the very brands referred to in the complaint are large nationwide concerns like Butler Bros., R. 67, 72, 84; Macy's, R. 45, 48, 51, 55, 59, 65, 76, 95, 122; Electrolux Corp., R. 88; S. H. Kress Co., R. 94, 113; McKesson-Robbins, R. 96; Walgreen's, R. 108; J. C. Penney Co., R. 49, 100, not to speak of retailers the local courts know to be some of the largest in the community, like City of Paris, R. 48, 55, 59, 73, 85; The Emporium, R. 48, 51, 65, 74, 88, 119, 122; Dohrmann's, R. 49, 65, 67, 73, 87, 119, 122; Schwabacher, Frey, R. 49, 51, 59, 77, 103; The White House, R. 55, 59, 108; I. Magnin's, R. 55; Gump's, R. 91; Sherman Clay & Co., R. 48, 77, 80, 104, 114; Kahn & Keville, R. 68, 75, 93; Lachman Bros., R. 49, 51, 56, 64, 69, 71, 75, 79, 94, 113, 122, 123; Redlick's, R. 64, 69, 71, 76, 80, 101, 113, 122, 123; Scott Plumbing Co., R. 69; Sterling Furniture Co., R. 48, 51, 65, 70, 77, 80, 105, 122; Charles Brown & Sons, R. 45, 49, 59, 72, 84; Union Furniture Store, R. 107, 115, 123; W. & J. Sloane Co., R. 48, 104, and L. R. Jackson Home Wares Co., R. 59, 93, none of which were parties to this litigation or charged with participation.

ARGUMENT

Repeatedly petitioner refers to the decision of the court below as if it holds that a single trader has no remedy under the Sherman Act (e.g., Pet. 7, 31, 36). To the direct contrary, the court carefully announced the settled rule that a single trader—any "private plaintiff" (Pet. App. 25)—has a cause of action under the Sherman Act *if* he is injured by conduct proscribed by that Act.

Basically, the question is whether the case stated in the opinion of the court of appeals involved a "restraint of trade or commerce". Section 1 of the Sherman Act does not prohibit all "conspiracies" but only such as are "in restraint of trade or commerce". As this Court said in *Chicago Board of Trade v. United States* (1917), 246 U.S. 231, 238, and recently repeated in *Northern Pacific Railway Co. v. United States* (1958), 356 U.S. 1, 5, it is elementary that the key phrase—"restraint of trade"—is not to be given a drily literal meaning. At an early date, in *Wilder Mfg. Co. v. Corn Products Co.* (1915), 236 U.S. 165, the Court stated that

> "the prohibitions of the statute were enacted to prevent not the mere injury to an individual • • • but the harm to the general public which would be occasioned by the evils which it was contemplated would be prevented, and hence • • • prohibitions of the statute • • • were co-extensive with such conceptions" (p. 174).

Accordingly, one of the expressions which emerged is that to constitute a violation of the Sherman Act there must be a "public injury" and that the Act cannot be invoked in aid of a merely private controversy—a shorthand way of saying that not all conspiracies violate that Act because not all restrictions on trade fall within its purview.

Apex Hosiery Co. v. Leader (1940), 310 U.S. 469, gave the definitive expression of the kind of restriction on trade

with which the Act is concerned. Rejecting the contention that "the Sherman Act is violated when it is shown that a combination or conspiracy existed which resulted in a restraint of commerce" (pp. 473, 484),[7] it held that the term "restraint of trade" was to be interpreted "in the light of its legislative history and of the particular evils at which the legislation was aimed" (p. 489), that "the mere fact of * * * restrictions on competition does not in itself bring the parties to the agreement within the condemnation of the Sherman Act" (p. 503); that

> "* * * The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, *all of which had come to be regarded as a special form of public injury*" (p 493),[8]

and that the Court had never "departed from the conception of the Sherman Act as affording a remedy, public and private, for the public wrongs which flow from restraints of trade" in this common-law sense (p. 500).[9]

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7. Even when the defendants "intended to restrain commerce" and such was the direct consequence (pp. 475, 485).

8. The emphasis is as supplied in the quotation of this passage in *Radovich v. National Football League* (1957), 352 U. S. 445, 453, footnote 10. Unless otherwise indicated emphasis throughout this brief is ours.

9. The petition would dismiss *Apex* as a "labor" case (pp. 27, 28). But the Court took pains in that case to make clear that it was not decided on any ground peculiar to labor or labor organizations. It said (p. 512):

> "Apart from the Clayton Act it [the Sherman Act] makes no distinction between labor and non-labor cases. We * * * hold * * * both in labor and non-labor cases, that such restraints are not within the Sherman Act unless they are intended to have, or in fact have, the effects on the market * * * Unless the principle of these cases is now to be discarded, an impartial application of the Sherman Act to the activities of industry and labor alike would seem to require that the Act be held inapplicable * * *."

In *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.* (1948), 334 U.S. 219, this Court stated the test of a private party's right to recover under the Act to be "whether the statute's policy has been violated in a manner to produce the *general consequences it forbids for the public* and the special consequences for particular individuals". (p. 243)

If a restriction does not meet these tests, it is not a "restraint of trade", and one seeking damages must find other bodies of law over which a federal court has no cognizance in the absence of diversity jurisdiction. The Sherman Act was not designed to bring under federal cognizance all alleged commercial torts, or make every quarrel justiciable in the federal courts as an antitrust case merely by the talismanic charge of conspiracy.[10]

The rule applied by the courts below has been settled law since the Standard Oil case in 1911 held that the Sherman Act applies only to "acts which were unreasonably restrictive of competitive conditions", *Standard Oil Co. v. United States* (1911) 221 U.S. 1, 58. The decision that petitioner's case fails to meet these settled tests of the Act is in accord with the decision of every court before which similar complaints have come. It has been held, repeatedly, that the Sherman Act is not concerned with whether a particular retailer, sales agent or consignee handles or sells a particular commodity, so long as there are many others selling it, there being no effect, and no purpose to work an effect, on prices, quality or quantity available to the public and no monopoly. Public injury in this sense is essential. See, for

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10. As cogently said in *District of Columbia Cit. Pub. Co. v. Merchants and Manufacturers Assn.* (D.D.C. 1949), 83 F. Supp. 994, 997:

> "• • • although there may exist an actionable wrong, the individual's right to redress cannot be asserted by virtue of the Sherman Act."

example, *Shotkin v. General Electric Co.* (10 Cir., 1948), 171 F.2d 236; *Feddersen Motors v. Ward* (10 Cir. 1950), 180 F.2d 519;[11] *Hudson Sales Corp. v. Waldrip* (5 Cir. 1954), 211 F.2d 268, cer. den. (1954) 348 U.S. 821; *Westmoreland Asbestos Co. v. Johns-Manville Corp.* (2 Cir. 1943), 136 F.2d 844; *Ruddy Brook Clothes v. British & Foreign Marine Ins. Co.* (7 Cir. 1952), 195 F.2d 86, cer. den. (1953) 344 U.S. 816; *Kinnear-Weed Corp. v. Humble Oil and Refining Co.* (5 Cir. 1954), 214 F.2d 891, cer. den. (1955), 348 U.S. 912; *Interborough News Co. v. Curtis Publishing Co.* (2 Cir. 1955), 225 F.2d 289, affirming 127 F. Supp. 286 (S.D. N.Y. 1954); *Miller Motors, Inc. v. Ford Motor Co.* (4 Cir. Jan. 1958), 252 F.2d 441.

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11. The petition (at p. 30) cites *New Home Appliance Center v. Thompson*, 250 F.2d 881 as a later decision of the Tenth Circuit claimed to be a rejection of the *Shotkin* and *Feddersen* cases. This is plainly not so. The *New Home Appliance* case was decided purely as a question of pleading, not on a motion for summary judgment, the court noting (p. 883) that "the free use of summary judgment is available to avoid expensive trials of frivolous claims". The issue was simply the sufficiency of the complaint which alleged a conspiracy aimed not at the plaintiff alone but of a

> "purpose, object and effect * * * to deny retail appliance *dealers* in Denver, Colorado free access to the channels of interstate commerce by preventing them from making interstate purchases; and requiring them to purchase their requirements of home appliances from local wholesalers in Colorado, and thus *to fix the prices* at which such products were to be sold retail by Denver retail dealers; *to monopolize* interstate commerce in wholesale appliances and to eliminate the complainant as a competitor in such trade." (p. 882).

That is, it charged a conspiracy aimed at the whole class of retail dealers, to fix prices, and to monopolize, whereby

> "It was specifically alleged that by such concerted action, the defendants had restrained and monopolized a substantial part of interstate commerce by eliminating the plaintiff's competition and raising prices for home appliances to consumers in Denver and vicinity." (p. 883).

Precisely these elements were wholly lacking in the present case.

District Court decisions to the same effect are numerous.[12]

Petitioner does not contend (Pet. 9-16) that its case meets these settled tests but contends that they have been swept aside by *Radovich v. National Football League* (1957), 352 U.S. 445 (e.g., pp. 9-16). This contention was fully answered by the court below. *Radovich* "was a pleading case" (Pet. App. 17), for the complaint had been dismissed on a motion directed to the pleading alone, in contrast with the present case where judgment was entered upon motion for summary judgment in which undisputed facts were adduced to control and clarify the pleading. As this Court noted (352 U.S. 445, 448):

> "Since the complaint [in Radovich] was dismissed its allegations must be taken by us as true. It is, therefore, important for us to consider what Radovich alleged."

What *Radovich* alleged was not a conspiracy aimed at the plaintiff alone but a conspiracy to monopolize a whole industry, to boycott a whole football conference and all its players, so as to destroy the competition of the entire conference and thereby to produce a monopoly of all professional football in a single conference. Radovich's injury was

> "* * * the result of a conspiracy among the respondents to monopolize commerce in professional football

12. E.g., *Neumann v. Bastian-Blessing Co.*, 70 F. Supp. 447 (N.D. Ill. 1947); *Riedley v. Hudson Motor Car Co.*, 82 F. Supp. 8 (W.D. Ky. 1949); *Northern California Monument Dealers v. Interment Assn.*, 120 F. Supp. 93, 95 (N.D. Cal. 1954); *Abouaf v. J. D. & A. B. Spreckels Co.*, 26 F. Supp. 830 (N.D. Cal. 1939); *Arthur v. Kraft-Phenix Cheese Corp.*, 26 F. Supp. 824 (D. Md. 1938); *District of Columbia Cit. Pub. Co. v. Merchants and Manufacturers Association*, 82 F. Supp. 994 (D.D.C. 1949); *Swartz v. Forward Ass'n.*, 41 F. Supp. 294 (D. Mass. 1941); *Admiral Theatre Corp. v. Paramount Film Distributing Corp.*, 140 F. Supp. 686 (D. Neb. 1955); *Radiant Burners, Inc. v. American Gas Association, Inc., et al.* (N.D. Ill. Dec. 1957); 1957 Trade Cases, Para. 68,909.

among the States. The purpose of the conspiracy was to 'control, regulate and dictate the terms upon which organized professional football shall be played throughout the United States' * * *. It was part of the conspiracy to boycott the All-America Conference and its players with a view to its destruction and thus strengthen the monopolistic position of the National Football League" (pp. 448, 449).

The petition's next most frequent citation is *Binderup v. Pathe Exchange* (1923), 263 U.S. 291 (e.g., Pet. p. 16, et seq.). That was a case of monopoly and, in addition, of a conspiracy having price-fixing as its object and directed at a class. The defendants there were film distributors and controlled *all* the films in the United States, and their Film Board of Trade aimed at the control of *prices* and terms of *all* exhibitors. Plaintiff, an operator of a chain of motion picture theatres in Nebraska (p. 301), was injured as one of the class of exhibitors. The complaint alleged (263 U.S. at 302, 303):

"* * * that these distributors control the distribution of *all* films in the United States and that *the films cannot be procured from others.* * * * It is alleged that * * * the Omaha Film Board of Trade was organized for the purpose of enabling these distributors *to control prices and dictate terms to their patrons* in Nebraska and other States."

Petitioner's view of the *Binderup* decision was advanced and rejected as incorrect in *Interborough News Co. v. Curtis Publishing Co.*, 127 F. Supp. 286 (S.D. N.Y.) where a directed verdict was granted and affirmed, 225 F.2d 289 (2 Cir. 1955).

In discussing the *Binderup* case, and elsewhere throughout its argument, petitioner seeks refuge in labels, ignoring

substance.[13] Thus it labels this case as one of "boycott".[14] A collective refusal to deal with a whole class of persons may well always be illegal as involving public injury. In contrast, a refusal to deal with a single person may or may not be. In a particular case it may have the purpose or effect of fixing prices, limiting quantity, achieving a monopoly, or the like. If so, it would fall within the prohibitions of the Sherman Act; otherwise not, for what makes the illegality is "either what was sought to be accomplished by the concerted refusals to deal or what was the necessary result thereof," not the label "boycott". *Interborough News Co. v. Curtis Publishing Co.* (S.D. N.Y. 1954), 127 F. Supp. 286, 300, 301, affirmed 225 F.2d 289 (2 Cir. 1955).

Another example of petitioner's reliance on labels is its repeated reference to alleged discrimination "in prices, advertising allowances, demonstration techniques and other terms and conditions" of sale (e.g., Pet. 3, 4, 5, 10, 19, 23, 24, 25, 26). The issues of discrimination under the Robinson-Patman Act are not here involved (see pp. 4 and 5, supra),

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13. The opinion of the court below comments on "the many phrases * * * picked at random out of numerous cases * * * out of context" (Pet. App. 24) and further notes (Pet. App. 28):

> "Plaintiff cites us many cases involving group boycotts * * *. But each of his authorities involves factual situations entirely different from the one before us; factual situations in which the random phrases picked by plaintiff are proper and not inaccurate; they do not, however, support the contentions made here."

14. The word "boycott" is a word of many meanings, ranging from one person's refusal to deal with another to a group refusal to deal with a person as a means of coercing him from dealing with a third person. Cf. *United States v. Waltham Watch Co.*, 47 F. Supp. 524 (S.D. N.Y. 1942) and *Flintkote Company v. Lysfjord* (9 Cir. 1957) 246 F.2d 368, cer. den. 355 U. S. 835. The latter meaning was said by Judge (later Chief Justice) Taft to be the only meaning. *Toledo, A.A. & N.M. Ry. Co. v. Penn. Co.*, 54 Fed. 730, 738 (C.C. N.D. Ohio, 1893). A boycott may be legal or illegal under non-federal and common law principles of tort law depending on the facts and not the label.

and the test of illegality under the Sherman Act remains unchanged by labeling an alleged conspiracy to decline to sell to a person a "conspiracy to discriminate" against him.[15] Thus in *Feddersen Motors v. Ward* (10 Cir. 1950), 180 F.2d 519, the complaint alleged a conspiracy to discriminate against plaintiff but was held insufficient.

The many cases cited by petitioner, including the *Binderup* case, are all carefully analyzed and distinguished by the court below (Pet. App. 29-30) as cases where

> "* * * defendants' conduct either did or was intended to eliminate the sole competitor in a particular market, was directed at one of a very small number of competitors,[47] or involved the use of large scale monopolistic power derived from nationwide enterprises to eliminate a competitor and thereby substantially affect competition in the local market area. * * *"

"47. Removal of any one competitor thereby having a substantial effect on competition."

or as cases

> "* * * in which price fixing or some other form of complete market control was involved and where defendants' conduct was directed at a particular class of persons of which plaintiff was one. * * * the conduct involved either was intended to control the entire market and was directed at plaintiff because he refused to conform or was directed at an entire class of defend-

15. The petition cites (p. 19) *Moore v. Mead's Fine Bread Co.* (1954), 348 U.S. 115 and *Bigelow v. R.K.O. Radio Pictures* (1946) 327 U.S. 251. The *Moore* case involved the Robinson-Patman Act, not the Sherman Act at all. The *Bigelow* case did not involve a discrimination merely against plaintiff but "a discriminatory *system* of distributing motion pictures" (p. 255) which gave preference to the theaters owned, leased or operated by defendants themselves over all independents as a class (p. 256) and which was carried on "*as part* of a conspiracy to maintain minimum admission prices to be charged by exhibitors generally", and "the object of this conspiracy was to make it possible to maintain high admission prices (p. 257)"

ants' competitors, buyers, or sellers, one of whom was the plaintiff. * * * Not one of the out of context quotations from the foregoing cases used by plaintiff will support his position when read within its factual setting."

In the cases brought by a private plaintiff where the Sherman Act has been held violated, the conspiracy was either aimed at or struck a broader purpose or target than the particular plaintiff—for example, its objective was price fixing, limiting quantity to the public, degrading quality, or achieving a monopoly—and the particular plaintiff was injured because he stood in the way of those objects or otherwise as an incident to the accomplishment of that purpose.

Finally, in an attempt to inject into the case elements of monopolization, the petition asserts (p. 25) that "'This group [respondent suppliers], it is not denied, have selected Broadway-Hale to dictate market allocations. They have, it is not denied, refused to do business with the competitors of Broadway-Hale if it so requests", and it speculates about respondents' future intentions. These are erroneous statements. The sole charge was that respondents refused to sell to petitioner, with nothing whatever about other competitors or future plans or intentions. The court below expressed no views about the legal questions that would arise in a case where one retailer "dictate[s] market allocations" or where suppliers "refuse to do business with the competitors" of one retailer "if it so requests".

One further comment may be made. In order to avoid arguments about pleading, our motion for summary judgment approached the case on the basis on which the petitioner now treats it, i.e., on the assumption that it charged respondent suppliers with conspiring with Hale's not to sell

petitioner. And the court of appeals treated it on the same assumption (Pet. App. 23). But we cannot refrain from noting what a fantastic charge that is, for it taxes credulity to suppose that a manufacturer of radios and televisions like Zenith conspired with a manufacturer of gas stoves like Rheem and a manufacturer of clothes washers and dryers like Whirlpool-Seeger not to sell to petitioner. Elsewhere petitioner has put a less implausible face on its complaint, stating that Hale told each supplier respondent that it would not buy from it if it chose to sell to petitioner, and the supplier, thus having its choice of Hale's custom or petitioner's, preferred Hale's. Thus the petition (p. 24) quotes the complaint as alleging "that Broadway-Hale 'has purchased and continued to purchase the products of the manufacturer-distributor defendants upon the condition that the manufacturer-distributor defendants do not sell their products to the plaintiff.'" Such a charge would not be one of conspiracy at all, it being no conspiracy for a buyer to refuse to purchase goods from a seller who rejects a request to stop selling to a competitor, either under the Sherman Act[16] or the common law of California.[17]

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16. *United States v. Bausch & Lomb Co.* (1944), 321 U. S. 707, 729, approving *Federal Trade Commission v. Raymond Co.* (1924), 263 U. S. 565, 573, which in turn cited *Grenada Lumber Co. v. Mississippi* (1910), 217 U. S. 433, 440; also *Mackey v. Sears, Roebuck & Co.* (7 Cir., 1956), 237 F.2d 869, 872, cer. den. (1957), 355 U. S. 865.

17. *Rolley, Inc. v. Merle Norman Cosmetics* (1954), 129 C.A. 2d 844, 278 Pac. 2d 63.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated, San Francisco, California, June 25, 1958.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 76

KLOR'S INC., PETITIONER

v.

BROADWAY-HALE STORES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

Petitioner operates a retail store on Mission Street in San Francisco, California (R. 5).[1] Respondents are Broadway-Hale Store, Inc., which also operates a retail store on Mission Street; ten manufacturers of certain products (radios, TV sets, phonographs, refrigerators, stoves, clothes washers and driers); and ten distributors of these manufacturers (R. 5-8).

The complaint filed by petitioner charged that respondents have conspired to restrain and monopolize commerce in the products sold by the 20 named manufacturer and distributor defendants, in violation of

[1] "R" refers to the transcript of record. The court of appeals' opinion is reprinted as Appendix A to the petition and is cited herein as "App. A."

Sections 1 and 2 of the Sherman Act. It alleged that the manufacturer-distributor defendants have discriminated against petitioner in favor of respondent Hale by selling to Hale at substantially lower prices, by furnishing to it services and allowances not equally accorded petitioner, and by refusing to sell their products to petitioner (R. 9-11). It further alleged that Hale, as the operator of "a chain of key stores" in the Pacific Coast area (R. 11), has used its monopolistic buying power to obtain from the other respondents preferential terms and conditions, and to purchase from them upon the condition that they not sell their products to petitioner (R. 11-12).[2]

The defendants moved for summary judgment, submitting uncontested affidavits showing that (1) a large number of competing brands not covered by the charges of the complaint are sold in San Francisco, and (2) that many San Francisco retailers, including numerous retail stores on Mission Street within five or six blocks of petitioner's store, sell the brands covered by the complaint's charges (R. 122-125, 128-9). The district court granted the motion on the ground that the complaint failed to state a cause of action under the Sherman Act (R. 133-4).

The court of appeals, relying primarily upon *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, affirmed (App. A). It held that the Sherman Act's prohibition of "unreasonable" restraints of trade requires a showing that the public is or may be injured by the restraint, and that, on the facts standing admitted, actual or potential

[2] The allegations as to discrimination are also reflected in counts under the Robinson-Patman Act, but these counts were severed from the Sherman Act count and are therefore not involved here (App. A 6-7).

prejudice to the public was negatived (App. A 13-32). The court stated that concerted conduct "directed at harming the opportunity of a single trader to compete" (App. A 24) is not an unreasonable, prohibited restraint if, notwithstanding such restraint, the market is subject to strong competitive forces and defendants have neither sought nor obtained power to exercise market control (App. A 24-32).

DISCUSSION

The Government believes the decision below is in conflict with decisions of this Court, and that the petition presents a question of substantial public importance, namely, whether proof of injury to the consuming public in terms of actual or intended market control or substantial effect on the market is essential to establish a Sherman Act violation. In our view, the Act *does* protect "the opportunity of a single trader to compete," and destruction of that opportunity is a public injury under the Sherman Act's standard of right and wrong, irrespective of whether the public can freely buy elsewhere.

Except for those restraints which are deemed *per se* illegal, this Court has not undertaken to articulate a precise test for determining whether a particular restraint is unreasonable. Rather, it has stressed the necessity for considering the various relevant factors in the particular case, such as the nature and history of the restraint, the actual or probable extent of the anti-competitive effect, and the reason for adopting the restraint. See, e.g., *Board of Trade of the City of Chicago* v. *United States*, 246 U.S. 231; *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 527; *Sugar Institute, Inc.* v. *United States*, 297 U.S. 553, 600. The

court below has rejected this flexible approach. Its decision elevates the factor of injury to the "consuming public" to a position of controlling importance. Thus, it deems necessary a showing that the defendants have market control or have caused "substantial" interference with the "consuming public" (App. A. 31).[3]

In contrast, this Court, holding irrelevant "the importance of the interstate commerce affected in relation to the entire amount of that type of commerce in the United States," has stated that the Sherman Act "is designed to sweep away all appreciable obstructions so that the statutory policy of free trade might be effectively achieved." *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 226. Under the lower court's interpretation, many clear violations of the basic statutory policy of "free trade" would be permitted to flourish. For example, a conspiracy involving an appreciable amount of interstate commerce,[4] having no "legitimate business aims" (*Times-Picayune* v. *United States*, 345 U.S. 594, 622-23), and designed solely to eliminate a competitor, can hardly be deemed a reasonable restraint (see *infra*, pp. 6-7). Yet the lower court would not strike down such a restraint if a large number of other competitors existed to whom the consuming public could turn.

This Court, without examining the strength of the remaining competition, has held that a restraint adversely affecting "the liberty of a trader to engage in

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[3] *Apex Hosiery*, which was concerned with the applicability of the Sherman Act to a labor union's strike activities, does not furnish support for the broad proposition enunciated by the lower court. Cf. *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457, 466-467; *Allen Bradley Co.* v. *Local Union No. 3*, 325 U.S. 797, 806.

[4] In the instant case, there is no question but that the commerce requirement has been met (App. A 13).

business" is within the prohibitions of the Sherman Act. *Binderup* v. *Pathe Exchange*, 263 U.S. 291, 312; *Loewe* v. *Lawlor*, 208 U.S. 274, 293; cf. *Radovich* v. *National Football League*, 352 U.S. 445, 453-454;[5] *United States* v. *National Retail Lumber Dealers Assn.*, 40 F. Supp. 448, 458 (D. Colo.). The authorities thus establish that the policy of the Act is broad enough to protect the basic right of the individual entrepreneur to go into business and to stay in business free of coercive restraint by competitors or suppliers. Were it otherwise, those bent on restrictive trade policies would be enabled to pursue those policies at large by making a few conspicuous examples of individual traders failing to conform to their wishes.[6]

The unsoundness of the decision below is pointed up by consideration of the categories of *per se* violations. If petitioner's store had been the object of a price-fixing conspiracy or a tying arrangement, the restraint would be deemed *per se* unlawful. See *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 5; *United States*

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[5] In *Radovich*, this Court rejected the holding of the Court of Appeals for the Ninth Circuit that the plaintiff in a private treble damage suit must allege and prove that the violation charged against the defendant was "calculated to prejudice the public." *Radovich* v. *National Football League*, 231 F. 2d 620, 622-623. In doing so, the Court emphasized that the Sherman Act "is its own measure of right and wrong." 352 U.S. at 454.

[6] It is difficult to perceive how or at what point the lower court would determine that the elimination of individual entrepreneurs had passed permissible bounds. The court has failed to recognize that the sum-total effect of the elimination of a number of individual traders as a result of many diverse restraints is not negligible from the standpoint of public injury, even if in each case the public may patronize numerous other traders. In our view, the result of such eliminations would be a most serious encroachment on that optimum economic environment at which the Sherman Act aims. See *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 4-5.

v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 210. But the injury to the public in terms of market control would certainly be no greater in that instance than that caused by the restraints here alleged, which were deliberately aimed at complete elimination of petitioner's competition;[7] in both instances, the public could still turn to the same large number of other retail outlets. Although both types of restraints would have the same "pernicious effect" and "lack of any redeeming virtue" (*Northern Pacific Ry. Co.* v. *United States, supra*, 356 U.S. at 5), the lower court would strike down the one and exempt the other.

Applying the correct standard to the facts of the instant case, petitioner's complaint, we believe, clearly stated a cause of action under the Sherman Act. Allegations not contested in the respondents' motion for summary judgment show a scheme whereby Hale, using its "strategic position" (*United States* v. *Griffith*, 334 U.S. 100, 107) as the operator of a chain of key stores on the Pacific coast, has coerced distributors and manufacturers into cutting off supplies to petitioner, its Mission Street rival.[8] Hale does not offer any "legitimate business aims" (*Times-Picayune, supra*,

[7] As stated in *Binderup* v. *Pathe Exchange, supra*, at 312, "[i]t is difficult to imagine how interstate trade could be more effectively restrained than by suppressing it * * *."

[8] Respondent Hale's scheme is analogous to resale price maintenance schemes enforced by refusals to sell to price-cutters. While the simple act of refusing to sell to any particular customer may be perfectly lawful (*United States* v. *Colgate & Co.*, 250 U.S. 300), a resale price maintenance scheme enforced by refusals to deal with non-cooperating retailers is unlawful. *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707; *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441; Barber, *Refusals to Deal under the Antitrust Laws*, 103 U. of Pa. L. Rev. 847, 851-862.

345 U.S. at 622) in justification. In the present posture of the case, its purpose stands admitted as one to stifle a competitor—"the very type of thing the Sherman Act condemns," *Northern Pacific Ry. Co.* v. *United States, supra,* 356 U.S. at 8. If the trial should establish the "forbidden end" (*Times-Picayune,* 345 U.S. at 622) of stifling competition, the instant restraint will have been shown to be unreasonable on its face. See *Fashion Originators' Guild* v. *Federal Trade Commission,* 312 U.S. 457, 465; *Associated Press* v. *United States,* 326 U.S. 1.

Furthermore, the complaint alleges that respondents have conspired "together, and each with the other" (R. 9) to refuse to sell products to petitioner. This Court has frequently stated that a concerted refusal to deal is *per se* illegal. See, e.g. *Northern Pacific Ry. Co.* v. *United States, supra,* 356 U.S. at 5; *United States* v. *Columbia Steel Co., supra,* 334 U.S. at 522-23; *Times-Picayune Publishing Co.* v. *United States, supra,* 345 U.S. at 625; *Fashion Originators' Guild* v. *Federal Trade Commission, supra.* This is most particularly so where the purpose of the threat or refusal is to coerce or destroy an enterprise engaged in competition with some or all of the conspirators. Barber, *Refusals to Deal under the Antitrust Laws,* 103 U. of Pa. L. Rev. 847, 872-879.

CONCLUSION

Since we are of the view that the decision below conflicts with decisions of this Court, that it embraces an interpretation of the Sherman Act which greatly narrows the measure of protection afforded the individual trader, and that it seriously limits the availability of

the treble damage remedy to the trader who is the victim of boycott and similar tactics, we believe that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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SEPTEMBER 1958.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 76

KLOR'S, INC.,
Petitioner,
v.
BROADWAY-HALE STORES, INC., et al.,
Respondents.

Brief for Respondents in Reply to Memorandum for the United States as Amicus Curiae

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In the Supreme Court of the United States

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KLOR'S, INC.,
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Brief for Respondents in Reply to Memorandum for the United States as Amicus Curiae

The Memorandum of the Solicitor General, like the petition for a writ of certiorari, completely misconceives the case decided by the court below. Over and over the Government refers to this case as one involving "'the opportunity of a single trader to compete'" (p. 3), a conspiracy "designed solely to eliminate a competitor" (p. 4), "'the liberty of a trader to engage in business'" (pp. 4-5), "the basic right of the individual entrepreneur to go into business" (p. 5), "the elimination of individual entrepreneurs" (p. 5, n. 6), the "purpose * * * to stifle a competitor" (p. 7).

These characterizations are wholly alien to the case presented by the record. The pleadings and the affidavits,[1] dis-

1. The question below, contrary to the statements of the Solicitor General (pp. 2, 6), was not whether the complaint stated a cause of action. Affidavits on the motion for summary judgment, uncontested by petitioner, supplied the controlling facts. This was emphasized by the court below (Pet. App. 7).

close, simply, a case of competition between *continuing* competitors: the familiar competition between retailers for the right to resell the particular brands of certain manufacturers.

Respondent Hale and petitioner are two household appliance stores located within a few doors of each other on Mission Street in San Francisco. They are two of "literally hundreds of dealers in the San Francisco Bay Area" (Pet. App. 30) selling the products involved. Hale successfully competed with petitioner for the right to purchase and resell certain brands of certain products of certain suppliers. Numerous other brands were available to petitioner. Numerous other retailers, located near and far, purchased and sold the brands Hale succeeded in buying (Pet. App. 30). No possible inference from the pleadings and affidavits supports the statements of the Solicitor General that there was any agreement to "eliminate" petitioner. On the contrary, as the court below pointed out, among the competing brands available to petitioner were "many of the outstanding and most widely advertised brands in the country * * *. Appellant does not charge that he was denied the right to handle any of this vast number of brands manufactured and sold by companies not parties to this action" (Pet. App. 12). The broad allegation of the complaint that defendants "conspired" to prevent petitioner from obtaining radios, clothes washers, refrigerators, etc. (R. 9) was met on the motion for summary judgment by the uncontroverted showing that petitioner was able to obtain numerous brands of these appliances which were in free and open competition with the brands purchased by Hale.

Further, as the court below pointed out (Pet. App. 23):

> "There was no charge or proof that by any act of defendants the price, quantity, or quality offered the

public was affected, nor that there was any intent or purpose to effect a change in, or an influence on, prices, quantity, or quality, either directly or indirectly. It is not suggested that either the object or effect of the alleged conspiracy was to create an unreasonable restraint, illegal per se."

One of the most common forms of competition which exists in merchandising is the competition for the brand name goods of particular manufacturers. Two clothing stores situated side by side in a shopping district compete, for example, for the right to purchase Hart, Schaffner & Marx clothing. If one obtains that right on the condition that the next-door seller is not supplied with the same brand, the unsuccessful retailer is not "eliminated" where (as in the case at bar) he has available Hickey Freeman and numerous other brands of clothing. And this, of course, remains true where (as in the case at bar) additional lines of clothing are involved—Stetson hats versus Dobbs hats, Florsheim shoes versus Hanan shoes, Manhattan shirts versus Arrow shirts, Phoenix socks versus Interwoven socks—as long as each retailer has free access to the competing brand and numerous others. And no Sherman Act violation can exist, as the court below emphasized, where the public has access to all of these goods in a highly competitive market.[2]

The Government paraphrases the allegations of the complaint that Hale "as the operator of 'a chain of key stores' in the Pacific Coast area (R. 11), has used its monopolistic buying power" (Govt. Memo. p. 2), and that Hale "using its 'strategic position' * * * as the operator of a chain of key stores on the Pacific coast, has coerced distributors and

2. See cases cited at pages 13 and 14, footnote 12, Brief for Respondents in Opposition.

manufacturers into cutting off supplies to petitioner," (p. 6). But the affidavits on the motion for summary judgment demonstrated that these allegations were wholly without factual basis and presented no genuine issue.[3]

The Government's memorandum asserts that "The court below has rejected [the] flexible approach" (pp. 4-5) approved by this Court which "has stressed the necessity for considering the various relevant factors in the particular case, such as the nature and history of the restraint, the actual or probable extent of the anti-competitive effect, and the reason for adopting the restraint" (p. 3). But this approach, approved by this Court, is exactly the approach which the court below took.

The Government also cites numerous cases familiar in the field of antitrust, and quotes isolated phrases from each. It refers to tying arrangements (Govt. Memo. p. 5), to "resale price maintenance schemes" enforced by refusals to deal (p. 6), and to concerted refusals to deal with the purpose "to coerce or destroy an enterprise" (p. 7). No one of these situations is here presented, and no one of the cases cited has any resemblance to the case at bar. The quotations, out of context, are only misleading. The Government cites no conflicting decision and makes no reference to the numerous cases in the trial and appellate courts which accord with the decision below.[4]

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3. Brief for Respondents in Opposition, p. 9.

4. Brief for Respondents in Opposition, pp. 13, 14, n. 12. And see the following additional decisions, recently reported:

Delaune v. Hibernia National Bank of New Orleans (E.D. La. July 29, 1958), CCH Trade Reg. Rep. Current, par. 69,123;

Alexander v. Texas Co. (W.D. La. Aug. 22, 1958), CCH Trade Reg. Rep. Current, par. 69,124;

Nelligan v. Ford Motor Company (W.D. S.C. April 9, 1958), 161 F. Supp. 738.

CONCLUSION

For the foregoing reasons and for those stated in our brief in opposition, we submit that the petition for a writ of certiorari should be denied.

Dated, San Francisco, California, September 22, 1958.

Respectfully submitted,

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1958

No. 76

KLOR'S, INC., *Petitioner,*

vs.

BROADWAY-HALE STORES, INC., ADMIRAL CORPORATION, ADMIRAL DISTRIBUTORS, INC., ZENITH RADIO CORPORATION, WHIRLPOOL SEEGER CORPORATION, H. R. BEDFORD COMPANY, RADIO CORPORATION OF AMERICA, LEO J. MEYBERG COMPANY, EMERSON RADIO AND PHONOGRAPH CORPORATION, JEFFERSON-TRAVIS, INC., PHILCO CORPORATION, PHILCO DISTRIBUTORS, INC., DALLMAN SUPPLY COMPANY, RHEEM MANUFACTURING COMPANY, GENERAL ELECTRIC COMPANY, GENERAL ELECTRIC DISTRIBUTING CORPORATION, OLYMPIC RADIO AND TELEVISION, INC., OLYMPIC TELEVISION OF NORTHERN CALIFORNIA, TAPPAN STOVE COMPANY, O'KEEFE & MERRITT COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S OPENING BRIEF.

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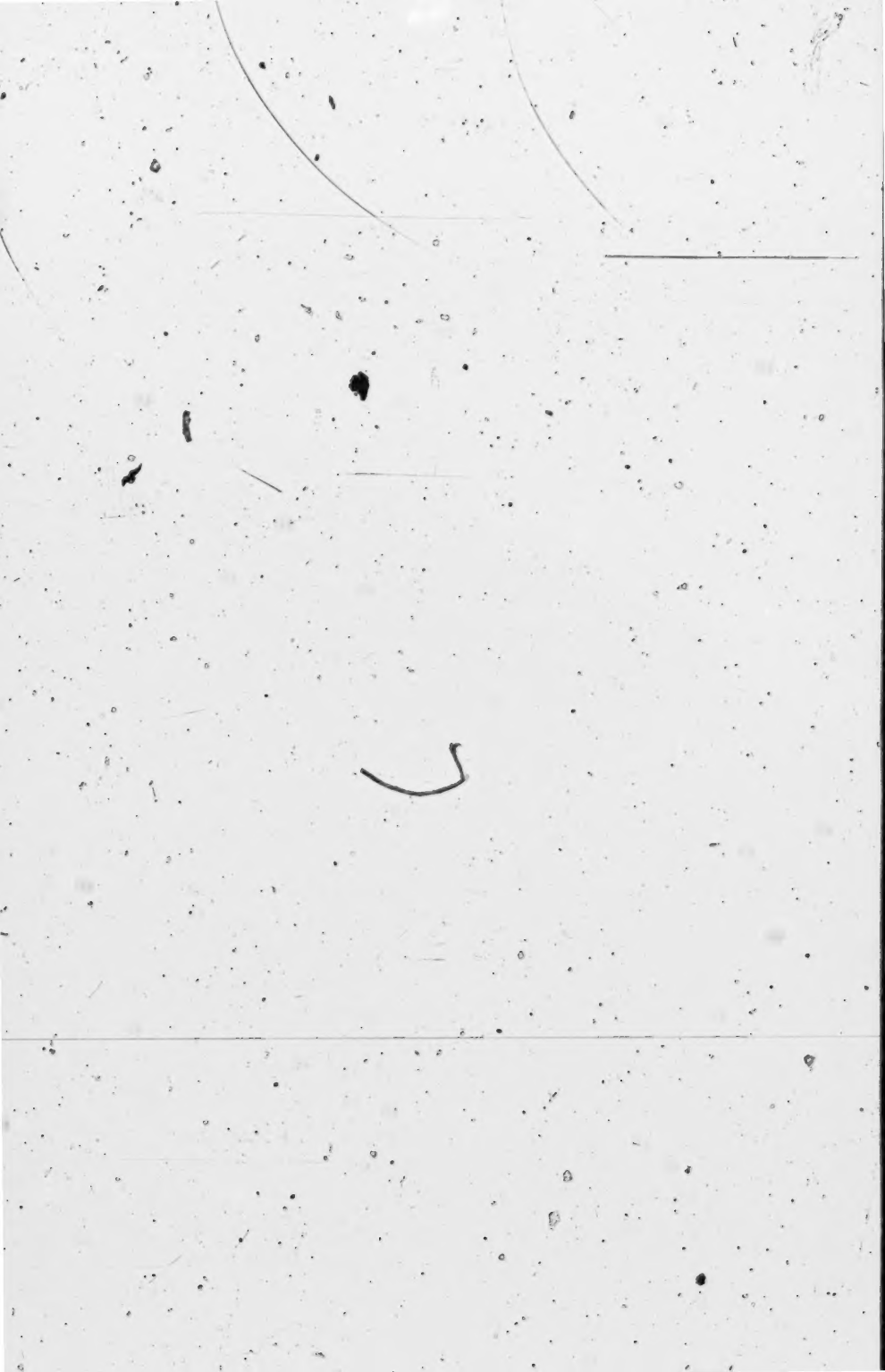

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1958

No. 76

KLOR'S, INC., *Petitioner,*

vs.

BROADWAY-HALE STORES, INC., ADMIRAL CORPORATION, ADMIRAL DISTRIBUTORS, INC., ZENITH RADIO CORPORATION, WHIRLPOOL SEEGER CORPORATION, H. R. BASFORD COMPANY, RADIO CORPORATION OF AMERICA, LEO J. MEYBERG COMPANY, EMERSON RADIO AND PHONOGRAPH CORPORATION, JEFFERSON-TRAVIS, INC., PHILCO CORPORATION, PHILCO DISTRIBUTORS, INC., DALLMAN SUPPLY COMPANY, RHEEM MANUFACTURING COMPANY, GENERAL ELECTRIC COMPANY, GENERAL ELECTRIC DISTRIBUTING CORPORATION, OLYMPIC RADIO AND TELEVISION, INC., OLYMPIC TELEVISION OF NORTHERN CALIFORNIA, TAPPAN STOVE COMPANY, O'KEEFE & MERRITT COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S OPENING BRIEF.

I.

OPINIONS AND JUDGMENTS IN THE COURTS BELOW.

The order of the District Court was filed on September 13, 1956 (R. 133-134) and the judgment of the District Court was filed September 18, 1956 (R. 135-136). Neither has been reported.

The judgment of the Court of Appeals was entered on March 28, 1958. (R. 181.) The opinion of the United States Circuit Court of Appeals for the Ninth Circuit was filed March 28, 1958. (R. 148.) 255 F. 2d 214.

This Court granted petition for certiorari October 13, 1958.

II.

JURISDICTIONAL STATEMENT.

Petitioner asserts that the respondents are in violation of the federal antitrust laws.

Sherman Act, Sections 1 and 2, July 2, 1890, Chap. 647, Sec. 1, 26 Stat. 209, as amended July 7, 1955, c. 281, 69 Stat. 282, 15 U.S. Code, Sec. 1, Sec. 2:

Sec. 1:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: . . ."

Sec. 2:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any

other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court."

Petitioner brings his action under Section 4 of the Clayton Act, October 15, 1914, Chap. 323, Sec. 4, 38 Stat. 731, 15 U.S. Code, Sec. 15:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

The judgment of the United States Court of Appeals for the Ninth Circuit affirming the dismissal of petitioner's complaint and for summary judgment under said laws by the District Court was entered on March 28, 1958. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254(1).

III.

STATUTES INVOLVED.

The statutes involved are set forth above. In addition, F.R.C.P., Rule 56, Summary Judgment, is printed and attached hereto in Appendix A.

IV.

QUESTION PRESENTED.

1. Whether Section 4 of the Clayton Act affords the federal courts jurisdiction to protect single traders from forbidden conduct of the type condemned in the Sherman Act which is in or affects the free flow of commodities in interstate trade and commerce; or, whether the federal courts are allowed to dismiss bona fide complaints under summary judgment procedure on the ground that the antitrust laws afford protection to the public at large and do not afford federal jurisdiction to the protection of a single trader.

V.

STATEMENT OF THE CASE.

The petitioner-plaintiff was the owner of a large appliance store located on Mission Street, San Francisco. It was next door to one of respondent's Broadway-Hale's department stores. The complaint was filed on February 23, 1956 against Broadway-Hale and ten leading manufacturers and eight distributors of radio and television sets and household appliances. The complaint as originally filed contained charges of violations of the Robinson-Patman Act, Act of June

19, 1936, Chap. 592, 49 Stat. 1526, 15 U.S.C. 13. By pre-trial order (R. 19, 20) the complaint as to violations of the Sherman Act were separated from charges of violations of the Robinson-Patman Act. Thereafter below and on appeal the proceedings were concerned only with Count One of petitioner's complaint, as printed in the record. (R. 3-15.)

Petitioner's complaint asserted the jurisdiction of the federal Court under the antitrust laws, and alleged that the business of manufacturing, distributing and selling radios, television sets, and other household appliances are within or directly affect trade and commerce among the several states. The complaint alleged a continuous stream of trade and commerce between the states in the manufacture and distribution and sale of these goods throughout the United States. (R. 4.) It alleged that these products are manufactured in one place and transported to factory branches, distributors and other selling organizations; then transported from said branches or distributors to retailers. (Id.)

The complaint then described the parties. It set forth the states of incorporation of the defendant manufacturers and distributors. It specified which products are manufactured by the respondents and the affiliation if any between the respondents. (R. 5-8.)

The complaint alleged that the respondent, Broadway-Hale Stores, Inc. "is a Delaware Corporation, operating among other things, a chain of stores in the western area of the United States selling at retail radios, television sets, clothes washers and dryers, re-

frigerators, electric and gas ranges, phonographs and electrical appliances." (R. 5.)

The respondent manufacturers and their distributors were shown to be competitive in the manufacture or distribution of radio and television sets, ranges, refrigerators and washers and dryers, as follows (R. 6-8, 127, 211):

Radio and television:

Admiral Corporation and Admiral Distributors, Inc.

Zenith Radio Corporation, H. R. Basford Company.

Radio Corporation of America, Leo J. Meyberg.

Emerson Radio and Phonograph Corp., Jefferson-Travis.

Philco Corporation, Philco Distributors, Inc., Dallman Supply Company.

General Electric Company, General Electric Distributing Corporation.

Olympic Radio and Television, Inc., Olympic Television of Northern California.

Ranges:

Admiral, supra; General Electric, supra; Tappan Stove Company; O'Keefe and Merritt Company; Rheem Manufacturing Company (Wedgewood).

Refrigerators:

Philco, supra; General Electric, supra; Admiral, supra.

Washers and dryers:

Whirlpool-Seeger Corporation (p. 21); H. R. Basford Corp.; General Electric, supra.

The complaint then alleged that the interstate trade and commerce in the manufacture, distribution and sale of radios, television sets, clothes washers and dryers, refrigerators, electric and gas ranges, phonographs and electric appliances was restrained in the San Francisco Bay Area by the respondents in violation of Sections 1 and 2 of the Sherman Act. (R. 8-10.) The restraint occurred by the "contracting, combining, conspiring together, and each with the other". (Id.) Competition in the interstate distribution and sale of these appliances, it was alleged, was "substantially lessened, limited and restrained". The refusal of the respondents to sell to the petitioner, and the discrimination against him in the favor of Br dway-Hale restrained, lessened and limited interstate trade. (Id.) The complaint alleged that the conspiracy and combination "tend to and do actually restrain and monopolize interstate commerce in the distribution and sale of radios, television sets, clothes washers and dryers, refrigerators, electric and gas ranges, phonographs and electric appliances in favor of Hale." (R. 10.)

Next the complaint specified the discriminatory conduct of the respondents (R. 10-11) and the group refusal to deal with petitioner. (Id.)

Paragraph 8 of the complaint directly raised the "monopolistic buying power" of the defendant Broadway-Hale. It alleged that said respondent used its monopolistic buying power to negotiate terms and conditions of acquisition and purchase of the products manufactured, distributed and sold by the defendants.

(R. 11.) It alleged that Broadway-Hale "had used its monopolistic buying power" in dealing with the manufacturer-distributor respondents, and that it "has purchased and continued to purchase the products of the manufacturer-distributor defendants upon the condition that the manufacturer-distributor defendants do not sell their products to the plaintiff." (R. 12.) It alleged that the manufacturer-distributor respondents did business with Broadway-Hale on a chain basis. (Id.)

The complaint then specified injury and damages by reason of the monopoly buying power of defendant Hale and the illegal discriminatory tactics, and conspiracies involved. (R. 12, 15.)

The complaint, then, may be summarized as involving the following:

(1) A conspiracy composed of ten interstate distributors, their manufacturers and an interstate retailer, Broadway-Hale, to discriminate against the petitioner as to those products sold it in prices, advertising allowances, demonstration techniques, and other terms and conditions connected with the sale and distribution of the products manufactured and sold by respondents. (Complaint, pr. 6, R. 9-11.)

(2) A conspiracy composed of the same parties to refuse to sell their products to petitioner, a group refusal to deal.

(3) A plan by these parties to allow Broadway-Hale a monopolistic position in the sale of their products.

(4) An attempt by Broadway-Hale to use its chain buying power to monopolize the sale of these parties' products and to eliminate competition from petitioners.

(5) A specific intent by Broadway-Hale to monopolize the retailing of household appliances.

After the complaint was filed, the respondent Broadway-Hale immediately moved to dismiss Count One of the complaint for failure to state a claim for relief. (R. 16.) In its dismissal papers it urged that (R. 16-17):

> "The cases are legion that no cause of action under the Sherman Act exists unless there is an *injury to the public interest,* and that the Act does not care whether the plaintiff or someone else does the business so long as interstate commerce continues. That is to say, there must not only be injury to the plaintiff, but to the *public also.*"

Thereafter the order separating the counts in the complaint was made (R. 20), and the respondents, still without asserting an answer, moved to dismiss Count One of the complaint on two grounds. These grounds were failure to state a claim upon which relief can be granted and for summary judgment on the ground that there is no genuine issue as to any material fact. (R. 22-23, 128, 130, 132.)

The basic foundation of the respondents' motions was the failure on the part of the petitioner to have shown an injury to the public interest.

As against the positive averments of petitioner's complaint alleging conspiracies to discriminate and boycott, the use of monopolistic chain buying power and the oppression of the competition of a trader, the respondents in support of their motion for summary judgment filed affidavits which showed the lists of accounts to which the merchandise was sold and the availability of other products on the market.

The affidavit of Broadway-Hale did not inform the Court of relevant facts or figures to show its lack of chain buying power. It did not inform the Court of its volume of purchases, how it transacted business, its relative growth or decline in volume of purchases or sales. It did not deny the allegations of the petitioner's complaint. The allegations of the monopolistic plan to injure the petitioner stood virtually uncontested. Instead the affidavit showed only that there were other brands of merchandise available to petitioner than those involved in the complaint, and that there were numerous retail dealers in the San Francisco telephone book listings. (R. 25-43.)

The affidavit of Broadway-Hale failed to assert that it could have successfully operated with the products claimed denied to petitioner, or that it had not affirmatively sought to prevent its competitor from obtaining these products. The affidavit of Broadway-Hale further failed entirely to direct itself to the issues of interstate commerce. It did not indicate to the Court where it was operating or how it did business.

The affidavits of the respondent manufacturers and distributors were of a similar cast. These affidavits did not contain statements controverting the allegations of conspiracy and monopolization. Rather they showed that the respondents did not sell their merchandise to petitioner. (Admiral, R. 45-47; Zenith, R. 48-50; Whirlpool, R. 50-52; RCA, R. 52-54 (and see telephone book, R. 30); Emerson, R. 54-57; Philco, R. 58-62; Wedgewood Stoves, R. 62-66; General Electric, R. 66-116; Olympic, R. 116-117; O'Keefe & Merritt Company, R. 121-124.)

Although the affidavits affirmatively showed that the respondents had not supplied the petitioner, they offered no factual evidence of why such was the case. They failed to inform the Court of how they classified their accounts, their volume of business with their various accounts and the volume of their business in interstate trade and commerce.

The affidavits were directed at a legal proposition; that the antitrust laws do not afford a federal court jurisdiction to determine the merits of a complaint filed by a single competitor against his chain buying competitor and his potential suppliers if the public is otherwise able to buy products.

The Courts below were faced with hybrid affidavits in summary judgment which showed on their face the existence of a group refusal to sell without explanation or justification. Petitioner, although admittedly operating a large retail store, "at least comparable to the stores operated by Hale in plaintiff's com-

petitive area" (R. 11) was admittedly unable to obtain the following merchandise: Admiral radios, televisions, refrigerators and electric ranges, Zenith radio and television sets, Whirlpool clothes washers and dryers, RCA radio and television sets, Emerson radio and television sets, Philco radio and television sets and refrigerators, Wedgewood stoves, General Electric television sets and radios, electric ranges and clothes washers and dryers, Olympic radio and television sets, Tappan stoves, O'Keefe & Merritt products. (R. 45-125.)

A summary of what the affidavits disclosed is set forth in the opinion of the Court of Appeals below. (R. 158-160.)

The Courts below, however, did not demand that the respondents controvert the allegations of petitioner, and accepted these affidavits as sufficient to show that the federal courts did not have jurisdiction to allow the petitioner a trial on the merits. The decision and judgment of the District Court are based on lack of jurisdiction under the antitrust laws.

The District Court stated that Count One is not a cause of action under the antitrust laws. Count One, it said, "is not concerned with private damage caused by a public wrong proscribed by the Act." (R. 134.) The Court further stated that "there is not the slightest basis either in substantiality or law for the exercise of our jurisdiction." Thus the Court did not seemingly rely on F.R.C.P., Rule 56, in its opinion, by saying that there was a lack of disputed fact between the parties. Rather, the Court stated that peti-

tioner had not raised a claim for relief under the antitrust laws.

The concept of "public injury" was invoked.

The judgment of the District Court was a judgment of dismissal of the complaint and for summary judgment. (R. 135-136.) The judgment did state that there is no genuine issue of fact respecting Count One. (Id.)

The Ninth Circuit affirmed the judgment of the lower Court. (R. 181.) The Court held that petitioner's first claim for relief was fatally defective, and that the facts proved no conduct in violation of the antitrust laws because there had been no conduct by which the "public" could conceivably suffer injury. (R. 180.) Construing the complaint and the affidavits together, and considering the facts judicially known to the Court, the Court of Appeals below affirmed the motion for summary judgment. (Id.) Thus the Ninth Circuit affirmed the judgment of the lower Court that the proceedings below had demonstrated that the federal court had no jurisdiction under the antitrust laws to afford petitioner a trial by jury as demanded. (R. 15.)

The Court of Appeals concluded as follows: (1) the antitrust laws do not condemn the entry into conspiracies by otherwise competitive corporations affecting interstate trade and commerce to the injury of a single trader, and do not condemn the plans of a chain buying corporation to harm and injure its competitor; (2) the antitrust laws are designed to protect only the public at large, and the public is not

entitled to the competition of all traders in a market free of predatory conduct otherwise condemned by the antitrust laws if applicable to an entire class; (3) the existence of a conspiracy in *per se* restraint of trade, a conspiracy to boycott, may be controverted on summary judgment by showing that the conspirators did not ruin all or a substantial amount of competition; (4) the doctrine of *per se* violation of the antitrust laws permits or allows the Courts to consider the economic effect of the conduct *per se* forbidden on the public at large; (5) in a summary judgment setting, the Court may construe plaintiff's complaint against him and restrict inferences from the complaint. Thus the Court of Appeals failed to view petitioner's complaint as involving a conspiratorial refusal to deal or as involving predatory monopolistic conduct by the owner of a chain of retail stores doing business in interstate channels. (R. 171-172.)

The Court of Appeals did not base its decision on the interstate commerce jurisdictional test of the substantiality of the amount of interstate trade and commerce involved. The Court stated (R. 160):

> "We need not concern ourselves here with the substantiality of the amount of commerce involved. *Apex* tells us 'it is the nature of the restraint and its effect on interstate trade and commerce and not the amount of commerce which are the tests of violation.'"

VI.

SUMMARY OF THE ARGUMENT.

Petitioner is allowed by Section 4 of the Clayton Act to obtain damages against those conspiring or using monopolistic power to interfere with his "right of freedom to trade." *United States v. Colgate & Co.*, 1919, 250 U.S. 300, 307, 39 S.Ct. 465, 468; *Benderup v. Pathe Exchange*, 1923, 263 U.S. 291, 44 S.Ct. 96. The elimination or suppression of competition of a trader through conspiracy or through the use of monopoly power are public wrongs under the Sherman Act.

Petitioner's claim need only be "tested under the Sherman Act's general prohibitions on unreasonable restraints of trade" and meet the requirement that petitioner has thereby suffered injury. Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public, and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. These laws protect the victims of forbidden practices as well as the public. *Radovich v. National Football League*, 1957, 352 U.S. 445, 453, 77 S.Ct. 390, 395.

The allegations of petitioner's complaint are directly within the general prohibitions of the antitrust laws. The complaint alleges a conspiratorial refusal to deal. It is the entry into this conspiracy, not its effect, which the antitrust laws condemn. *Northern Pacific Ry. Co. v. United States*, 1958, 356 U.S. 1, 78 S.Ct. 514; *United States v. Socony Vacuum Oil Co.*, 1950, 310 U.S. 150, 224, 60 S.Ct. 811, 845.

The complaint alleges the use of monopoly chain buying power by a large interstate competitor who has sought to eliminate the competition of the petitioner. This is well within the statements of the Court in *United States v. Griffith,* 1948, 334 U.S. 100, 107, 68 S.Ct. 941, 945:

> "It follows *a fortiori* that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful."

The complaint alleges facts raising an issue of specific intent to monopolize the retailing of radio, television and household appliances by Broadway-Hale by boldly using chain buying power to cause a conspiracy to refuse to deal against petitioner. These allegations were not denied by the respondents and the petitioner was entitled to a trial by jury on this issue alone. *Times Picayune Publishing Co. v. United States,* 1953, 345 U.S. 594, 78 S.Ct. 891.

This Court has held that "injury to the public" is not a jurisdictional requirement in a private antitrust suit. *Radovich v. National Football League, et al.,* supra. This Court has held that the antitrust laws provide jurisdiction to allow a private trader to gain redress as to a conspiracy directed solely to the elimination of his business without more. *Binderup v. Pathe Exchange,* 1923, 263 U.S. 291, 44 S.Ct. 96.

Neither *Apex Hosiery Company v. Leader,* 1940, 310 U.S. 469, 60 S.Ct. 982, nor *Times Picayune Publishing Co. v. United States,* 1953, supra, allow the Courts to prevent petitioner from a right to a trial

by jury under the antitrust laws. The *Apex* case was involved only with the issue of what is the *kind of* restraint condemned by the Sherman Act. It distinguished restraints from the conduct of labor unions in a strike situation from restraints affecting free competition in business and commercial transactions. This action clearly involves restraints contrary to a free and untrammeled competitive market involving commercial transactions. The *Times Picayune* case involved the business practices of a single business entity and its effect on a single competitor. The Court of Appeals in this action, it is respectfully urged, could not say on the record before it that the case did not involve a group refusal to deal, or a group conspiracy to discriminate. The Court of Appeals likewise in this action could not say on the record before it that the case did not involve monopolization or a specific intent to monopolize. The Court of Appeals, it is respectfully urged, in this action could not say on the record before it that the respondents had not engaged in predatory, bold conduct aimed at the destruction of the petitioner.

The antitrust laws are a charter of liberty. They afford protection to the public by insuring freedom of and to trade. The demand a free, open, and untrammeled market place, allowing common opportunities. The acts protect the public, in part, by giving rights to traders to sue those that interfere with freedom to trade in such a market. The public policy of the antitrust laws providing for such a market place is a concern of the legislature, not the courts. A con-

spiracy composed of an interstate retailer with competing manufacturers and distributors doing business in interstate trade and commerce to combine to eliminate supplies flowing across the country to the competitor of one of the interstate members of the conspiracy is a restraint in or affecting a substantial amount of interstate trade and commerce. The use of chain buying power by a preferred and powerful interstate retailer to cause a group of interstate suppliers to single out a competitor and prevent his competition in a substantial market place is a restraint in or affecting a substantial amount of interstate trade and commerce.

VII.

ARGUMENT.

I.

THE SHERMAN ACT MAKES IT A PUBLIC WRONG FOR COMPETITORS TO COMBINE TO DISCRIMINATE OR BOYCOTT OR FOR ONE WITH A MONOPOLISTIC POWER OR WITH AN INTENT TO MONOPOLIZE TO CAUSE A GROUP CONSPIRACY TO SINGLE OUT ITS COMPETITOR AND SUBJECT IT TO SUCH RESTRAINTS. THE CLAYTON ACT, SECTION 4, AFFORDS THE FEDERAL COURTS JURISDICTION TO PROTECT THE SINGLE TRADER AGAINST SUCH COMBINATIONS AND MONOPOLISTIC ACTS.

A. Radovich v. National Football League held that the antitrust laws "protect the victims of forbidden conduct as well as the public".

1. The issue of "public injury" was distinctly put in issue in the Radovich case and directly rejected.

The issue before the Court is whether or not Section 4 of the Clayton Act extends jurisdiction to the

federal courts on behalf of a single trader who has been singled out by a combination and a monopolistic competitor to his injury and damage resulting from the types of restraints of trade condemned by the Sherman Act.

The learned Courts below have ruled that the Sherman Act expresses a congressional purpose to protect only the public at large. Thus restraints of trade, it was held, which are not voluntary restraints by the participants to fix prices, divide territories, restrict production, or otherwise control the market to the detriment of purchasers or consumers of goods and services or, unless the restraints otherwise are reasonable, but motivated by a specific intent to accomplish the equivalent of a forbidden restraint, are not within the ambit of the Sherman Act. (R. 170-171.)

The Court below has held that the requirements of private injury and damage resulting from anything forbidden in the antitrust laws as set forth by Section 4 of the Clayton Act were to be interpreted as subject to the judicially imposed test that there be "conduct by which the 'public' could conceivably suffer injury." (R. 180.)

It is respectfully asserted, however, that this Court has never viewed the jurisdiction of the federal courts under the antitrust laws as involving anything other than the jurisdictional test of interstate trade and commerce. The filing of a bona fide complaint disclosing conduct in or affecting a substantial amount of interstate trade or commerce and the perpetration of conduct of the kind condemned in the act meets the

jurisdiction requirements of Section 4 of the Clayton Act. *Hart v. Keith Vaudeville Exchange*, 1923, 262 U.S. 271, 43 S.Ct. 540; *Binderup v. Pathe Exchange*, 1923, 263 U.S. 291, 44 S.Ct. 96; *Moore v. Mead's Fine Bread Co.*, 1954, 348 U.S. 115, 75 S.Ct. 148.

That "public injury" is not a jurisdictional test in the application of Section 4 was directly raised and decided in *Radovich v. National Football League*, 1957, 352 U.S. 445, 77 S.Ct. 390. In this case the Court of Appeals below had held that the petitioner there, Radovich, could not obtain redress for personal injury and damage because:

> "Within the four corners of the complaint, we doubt that the alleged means, restraint by the reserve clause, and its enforcement, is legally sufficient to support, without more, a conclusion that these means were calculated to prejudice the public or unreasonably restrain interstate commerce." (Ninth Cir., 1956, 231 2d 620, at 623.)

The petition for a writ of certiorari in *Radovich* thus raised the question:

> "2. Whether a complaint for injuries by a private party under Section 4 of the Clayton Act is sufficient if it states violations of the antitrust laws and injury thereby."

The question of "public injury," on the acceptance of the writ of certiorari by this Court in the *Radovich* case, was then exhaustively briefed.

Petitioner Radovich urged that, "For public injury must occur in the participation in conduct condemned by Congress as harmful to the public. This rests on

the historic difference between the function of legislation and the function of judicial enforcement of Constitutional enactments." (Petitioner's Opening Brief, *Radovich v. National Football League*, No. 94, October Term, 1956, at p. 20.) The United States of America, as amicus curiae, urged that ". . . the court below clearly erred in reading into the statutory authorization the further requirement that the plaintiff in such a suit allege and prove that the violation charged against the defendant was 'calculated' to prejudice the public.' * * * Congress, when it outlawed certain conduct, made its own determination that the outlawed conduct was against the public interest." (Brief for the United States of America as Amicus Curiae, id., at pp. 11 and 12.)

The respondents in the *Radovich* case urged that, "The right of plaintiff to recover treble damages is incidental and subordinate to the protection of the public and it was created to induce private persons to aid in enforcement of the antitrust laws. Hence to state a claim for relief, a complaint must allege facts which would establish that the violations of the Sherman Act by which plaintiff allegedly has been damaged, are of such nature that the public itself has sustained a substantial injury." (Brief for Respondents, id., at p. 56.) The respondents urged that *Apex Hosiery v. Leader*, 310 U.S. 469, 500, 69 S.Ct. 982, 996, supported this contention. (Id., at p. 57.)

This Court after such presentation ruled as follows (352 U.S. 445, 453, 77 S.Ct. 390, 395):

> "Petitioner's claim need only be 'tested under the Sherman Act's general prohibition on unrea-

sonable restraints of trade.' Times Picayune Publishing Co. v. United States, 1953, 345 U.S. 594, 614, 73 S.Ct. 872, 883, 97 L.Ed. 1277, and meet the requirement that petitioner has thereby suffered injury. Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public[10] and has provided sanctions allowing the private enforcement of the antitrust laws by the aggrieved party. These laws protect the victims of forbidden practices as well as the public. Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 1948, 334 U.S. 219, 236, 68 S.Ct. 996, 1006, 92 L.Ed. 1328. Furthermore, Congress itself has placed the private antitrust litigant in a most favorable position through the enactment of § 5 of the Clayton Act.[11] Emich Motors Corp. v. General Motors Corp., 1951, 340 U.S. 558, 71 S.Ct. 408, 95 L.Ed. 534. In the face of such a policy this Court should not add re-

[10] In Apex Hosiery Co. v. Leader, 1940, 310 U.S. 469, 60 S.Ct. 982, 84 L.Ed. 1311, this Court said: "The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, *all of which had come to be regarded as a special form of public injury.*" (Emphasis supplied.) Id., 310 U.S. at page 493, 60 S.Ct. at page 992. In Standard Sanitary Mfg. Co. v. United States, 1912, 226 U.S. 20, 33 S.Ct. 9, 57 L.Ed. 107, speaking of the antitrust laws, the Court said: *"The law is its own measure of right and wrong,* of what it permits or forbids, *and the judgment of the courts cannot be set up against it* in a supposed accommodation of its policy with the good intention of the parties, and, it may be, of some good results." (Emphasis supplied.) Id., 226 U.S. at page 49, 33 S.Ct. at page 15.

"[11] 38 Stat. 731, 15 U.S.C. § 16, 15 U.S.C.A. § 16, declares that a final judgment against a defendant in proceedings by the Government for violation of the antitrust laws may be introduced by a private litigant in a subsequent treble damage action and establishes *prima facie* a violation of the antitrust laws."

quirements to burden the private litigant beyond what is specifically set forth by Congress in those laws."

But the Court of Appeals below distinguished the *Radovich* case from the instant action by first labeling it a pleading case and second by asserting that the *Radovich* case involved the elimination of the defendants' only competitor, the All America Conference. (R. 175, 176.) The Court stated:

> "Read thus, the *Radovich* case is entirely consistent with *Shotkin, Fedderson,* and all other cases in which the Supreme Court and the lower federal courts have adhered to the requirement that a violation of the Sherman Act requires conduct of defendants by which the public is or conceivably may be ultimately injured."[1]

As to these two contentions, petitioner respectfully submits that the instant case is much *more* a pleading case than the *Radovich* case, and second that this Court in *Radovich* made its ruling with respect to public injury, not with a view to the facts as such, but as a matter of legal principle.

Radovich involved a motion to dismiss *after detailed and exhaustive answers* were filed by the defendants, which placed the allegations of the complaint in the *Radovich* case directly in issue. (Transcript of Record, *Radovich v. National Football*

[1]But compare the 10th Circuit's opinion in *New Home Appliance Center v. Thompson,* 1957, 250 F.2d 881, with *Shotkin v. General Electric Co.,* 10 Cir., 1948, 171 F.2d 236, and *Fedderson Motors v. Ward,* 10 Cir., 1950, 180 F.2d 519. The 10th Circuit no longer supports this statement.

League, October Term, 1956, No. 94, at pp. 18-57.) Here the moving papers of the respondents involved both a motion to dismiss and a motion for summary judgment before answer. But the affidavits in support of the motion for summary judgment were not addressed to the jurisdictional requirements of interstate commerce, nor were they addressed to showing, by factual statements of what was said and done, that the alleged restraints of trade had not in fact occurred. They were addressed to the showing of a lack of public injury; that is, that the public could obtain the products denied the petitioner here and that the actions of Broadway-Hale did not affect the general availability of these products to the public.

B. The doctrine of "public injury" is as inapplicable to a single trader case as it was to the Radovich case.

1. The Sherman Act protects the single trader's competition.

If "public injury" is not a jurisdictional test then the Court of Appeals should have determined whether or not the matters involved were matters of interstate trade and commerce and whether or not the conduct of the respondents involved a restraint of such trade and commerce. (*Binderup v. Pathe Exchange,* 1923, 263 U.S. 291, 44 S.Ct. 96.)

Such is the case because the Sherman Act had adopted the public policy of the common law that restraints of trade are public wrongs. What was a question of public policy at common law became under the antitrust laws a legislative statement of statutory law. *United States v. Addyston Pipe and Steel Co.* (6th Cir., 1898), 85 Fed. 271, affirmed 1899, 175 U.S.

211, 20 S.Ct. 96; *Chattanooga Foundry & Pipe Works v. Atlanta,* 1906, 203 U.S. 390, 27 S.Ct. 65, affirming 6th Cir., 1903, 127 Fed. 23.

Thus the antitrust laws have as their very roots the voluntary restraints of a single trader. Judge Taft, *United States v. Addyston Pipe & Steel Co.,* 85 Fed. 271, 279:

> "From early times it was the policy of Englishmen to encourage trade in England, and to discourage those voluntary restraints which tradesmen were often induced to impose on themselves by contract. Courts recognized this public policy by refusing to enforce stipulations of this character. The objections to such restraints were mainly two. One was that by such contracts a man disabled himself from earning a livelihood with the risk of becoming a public charge, and deprived the community of the benefit of his labor. The other was that such restraints tended to give to the covenantee, the beneficiary of such restraints, a monopoly of the trade, from which he had thus excluded one competitor, and by the same means might exclude others."

When the restraint is not voluntary, but involves a coercive conspiracy an additional public wrong is involved in the participation in the conspiracy. (Id., at 293.) See also *Rex v. Eccles,* 1783, 1 Lea. C.C. 274; *Morris Run Coal Co. v. Barclay Coal Co.,* 1871, 68 Penn. 123. As to a combination not affecting supplies to competitors see *Mogul Steamship Co. v. McGregor & Co.* [1892], App. Cas. 5, affirming 23 Q.B.D. 598 (1889).

The antitrust laws, it is respectfully submitted, represent a broad charter of liberty protecting not only the public against all forms of combinations, but also maintaining a free and open competitive market to all traders, allowing common opportunities for each member of the public to succeed, not because of birth or status, but because of ingenuity and ability. Such abilities were to be tested in a free and untrammeled market affording equal competitive opportunities.[2]

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[2] *W. W. Montague & Co. v. Lowry*, 1904, 193 U.S. 38, 46, 24 S.Ct. 307, 309;

Chattanooga Foundry & Pipe Works v. Atlanta, 1906, 203 U.S. 390, 396-7, 27 S.Ct. 65, 66;

Eastern States Retail Lumber Dealers Ass'n v. United States, 1914, 234 U.S. 600, 609-610, 34 S.Ct. 951, 953;

United States v. Patten, 1913, 226 U.S. 525, 541, 33 S.Ct. 141, 144-145;

Ramsey v. Associated Bill Posters, 1923, 260 U.S. 501, 512, 43 S.Ct. 167, 168;

Binderup v. Pathe Exchange, 1923, 263 U.S. 291, 312, 44 S.Ct. 96, 100;

Anderson v. Shipowner's Ass'n of the Pacific, 1926, 272 U.S. 359, 363, 47 S.Ct. 125, 126;

United States v. Colgate & Co., 250 U.S. 300, 307, 39 S.Ct. 465, 468:

> "The purpose of the Sherman Act is to prohibit monopolies, contracts, and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade."

Paramount Famous Lasky Corporation v. United States, 1930, 282 U.S. 30, 44, 51 S.Ct. 42, 45;

Fashion Originators' Guild v. F.T.C., 1941, 312 U.S. 457, 466, 61 S.Ct. 703, 707;

United States v. Socony-Vacuum Oil Co., 1940, 310 U.S. 150, 214, 60 S.Ct. 811, 840;

Associated Press v. United States, 1945, 326 U.S. 1, 15, 65 S.Ct. 1416, 1422:

> "The Sherman Act was specifically intended to prohibit independent businesses from becoming 'associates' in a common plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the group compete. Victory of a member of such a combination over its

The antitrust laws protected the liberty of contract by condemning actions which restrained the liberty to contract. *Standard Oil Co. v. United States,* 1911, 221 U.S. 1, 62, 31 S.Ct. 502, 516.

And although *Standard Oil* interpreted the Act to condemn only unreasonable restraints, it did not read out the word "every" from Section 1.

The Sherman Act thus represents a congressional will to maintain freedom of trade as far as its constitutional power extended.[3] *United States v. South-*

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business rivals achieved by such collective means cannot consistently with the Sherman Act or with practical, everyday knowledge be attributed to *individual* 'enterprise and sagacity'; such hampering of business rivals can only be attributed to that which really makes it possible—the collective power of an unlawful combination."

International Salt Co. v. United States, 1947, 332 U.S. 392, 396, 68 S.Ct. 12, 15;

Mandeville Island Farms v. American Crystal Sugar Co., 1948, 334 U.S. 219, 236, 68 S.Ct. 996, 1006;

Northern Pac. Ry. Co. v. United States, 1958, 356 U.S. 1, 4-5, 78 S.Ct. 514, 517-518.

[3]Congress has indicated its determination for a positive antitrust policy and the protection of the small business concern. The policy of Congress, expressed in the Small Business Act, July 18, 1958, 72 Stat. 394, amending Act of July 30, 1953, 67 Stat. 232, 15 U.S. Code, Section 631 et seq., is worthy of note:

"Sec. 2: (a) The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation. Such security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed. It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchase and contracts for property and services for the Government (including but not limited to

Eastern Underwriters Ass'n, 1944, 322 U.S. 533, 64 S.Ct. 1162.

An effect of the Act of 1890 was to render contracts and combinations against public policy at the common law, unlawful in an affirmative and positive sense which allowed private traders to obtain redress over activities condemned by the statute. *United States v. Addyston Pipe and Steel Co.* (6th Cir., 1899), 85 Fed. 271, at 279. The right to recovery was not given to the public, but to the private trader. *Atlanta v. Chattanooga Pipe & Foundry Co.* (6th Cir., 1903), 127 Fed. 23, 270. The private action for damages under the antitrust laws is thus not derivative or secondary or subsidiary. It is simply a congressionally imposed right against those that violate its mandate of free trade.

It is thus respectfully submitted that the invalidation of the doctrine of "public injury" in the setting of the *Radovich* case has equal application in the instant setting involving a group conspiracy and the exercise of monopolistic buying power to gain a com-

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contracts for maintenance, repair, and construction) be placed with small business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the overall economy of the Nation."

The Senate Select Committee on Small Business, Report of Private Antitrust Enforcement in Protecting Small Businesses, 1958, Senate Report No. 1855, 85th Congress, 2nd Session, has recommended measures to further strengthen the role of the antitrust laws in their protection of small business.

The income tax treatment of Section 4, Clayton Act, settlement or judgment recoveries have been liberalized on behalf of the private antitrust plaintiff. Section 1306, I.R.C. of 1954 as added by Technical Amendments Act of 1958, Section 58.

petitive advantage and to eliminate the competition of a competitor.

C. A single competitor's rights to freedom of contract are protected by the antitrust laws and a restraint on this right when it involves matters of interstate trade and commerce is a restraint on interstate trade and commerce.

1. Binderup v. Pathe Exchange is a direct ruling that the antitrust laws condemn the entry into a conspiracy directed at a single competitor.

It is asserted in petitioner's application for a writ of certiorari that the case of *Binderup v. Pathe Exchange*, 1923, 263 U.S. 291, 44 S.Ct. 96, is controlling here.

In the *Binderup* case this Court held that a single trader who does business with interstate corporations and who thereby engages in transactions affecting the free flow of merchandise in interstate channels has an action under the antitrust laws against these interstate distributors who combine to refuse to deal with him or who coerce others to so refuse to deal even though the conspiracy is solely directed against the single trader.

It is respectfully asserted that this Court in the *Binderup* case was not concerned with market control which would result by the conspiracy directed against Binderup; it was concerned with the conspiracy itself. Clearly there were many enterprises available on the market in the *Binderup* setting which could have exhibited motion pictures or carried out Binderup's business. This Court was not concerned with market control; it was concerned that a conspiracy had taken place which put an end to Binderup's contracts and

future business potentials, and, a conspiracy which "restricts, in that regard, the liberty of *a* trader to engage in business." (Id., at 263 U.S. 312, 44 S.Ct. 101. Emphasis added.)

A conspiracy had taken place by interstate firms directed at a petitioner who did business with them or who could have done business with them. This conspiracy was meant to oppress Binderup. This was the concern of the Court, not with market control. The public wrong under the Sherman Act's standards was in the entry into a combination to harm a trader with interstate contacts.

Petitioner's complaint below included the charge of conspiracy engaged in by respondents.

The complaint of petitioner alleges a conspiracy between all the respondents. Section III, pr. 6 of the complaint states (R. 9):

> "Beginning at a period prior to 1952, and continuing uninterrupted up to and including the date of the filing of this complaint, the defendants, all well knowing the facts herein alleged, have restrained trade and commerce in the interstate distribution and sale of radios, television sets, clothes washers and dryers, refrigerators, electric and gas ranges, phonographs and electrical appliances in the San Francisco Bay Area by contracting, combining, conspiring together, and each with the other, in restraint and monopoly of said trade . . ."

Clearly, this is a conspiracy charge. The public wrong in petitioner's complaint is the entry into this conspiracy by otherwise competitive firms or through

"dealing with Hale throughout the period of time alleged on a chain basis and have manufactured, distributed and sold the products for resale in the San Francisco Bay Area in consideration of manufacturing, distributing and selling the products to Hale for resale in other parts of the West Coast area of the United States." (R. 12.)

Such a conspiracy is a conspiracy whether or not it includes all the suppliers of merchandise in the area or only some of them. A conspiracy may be composed of only two or more persons. In *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons,* 1951, 340 U.S. 211, 71 S.Ct. 259, the conspiracy involved was between two liquor manufacturers who were affiliated with each other. The complaint of the petitioner alleged that these two liquor companies had conspired to refuse to deal with wholesalers in Indiana who would not resell at maximum prices fixed by the companies. The petitioner was unable to obtain a continuing supply of liquor from these two manufacturers.

Manifestly, Seagram and Calvert were not the only two manufacturers of liquor products available in the market, but the evidence was sufficient to justify a verdict that the two companies had conspired together not to sell liquor to the wholesaler.

But it would no doubt next be urged that the conspiracy involved the fixing of maximum prices, conduct illegal per se. This Court, however, stated: "But the Sherman Act makes it an offense for respondents to agree among themselves to stop selling to particular customers." (Id., 340 U.S. 214, 71 S.Ct. 261.)

Thus aside from the clear indication that the public wrong involved in the *Kiefer* case included a conspiracy to refuse to deal between two putative competitors, as well as the effectuation of a price fixing agreement, it is respectfully asserted that *Kiefer* stands for the proposition that the availability of other product to a single trader victimized by a conspiratorial refusal to sell is immaterial. Accord, *C. E. Stevens v. Foster & Kleiser Co.*, 1940, 311 U.S. 255, 61 S.Ct. 210.

Further, if the conspiracy must relate to an issue of "market control" as stated by the Court below, the instant action is not lacking this issue.

This action manifestly does not deal with a situation in which two local competitors vie for the business of manufacturers who do business on an exclusive franchise basis. The instant action involves a respondent retailer who "enjoys monopolistic buying power by reason of the large number of retail outlets it operates." (Complaint, pr. 8, p. 11.)

Broadway-Hale has (Complaint, pr. 8, pp. 11-12):

> ". . . used its monopolistic buying power to negotiate terms and conditions of acquisition and purchase of the products manufactured, distributed and sold by the manufacturer-distributor defendants."
>
> ". . . purchased and continues to purchase the products of the manufacturer-distributor defendants upon the condition that the manufacturer-distributor defendants do not sell their products to the plaintiff."

Clearly, these allegations are sufficient to raise the issue of Broadway-Hale's monopolistic buying power. *United States v. Employing Plasterers' Ass'n,* 1954, 347 U.S. 186, 74 S.Ct. 452. These allegations were not denied by the respondents, nor did they proffer any evidential facts in their affidavits to show the in fact situation with respect to Broadway-Hale's asserted monopolistic buying power.

Thus the action is well within the principle that a simple monopolist, otherwise lawfully holding such power, may not use his power to gain a competitive advantage or to eliminate a competitor.

United States v. Griffith, 1948, 334 U.S. 100, 107, 68 S.Ct. 941, 945:

> "It follows a fortiori that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy *a competitor,* is unlawful." (Emphasis added.)

The attempt to eliminate the competition of a competitor by one enjoying monopolistic buying power by reason of the large number of retail outlets it operates is an assumption of power which the Sherman Act condemns.

Such action restrains competition as much as the fixing of retail maximum prices. It is bold, predatory behavior. *Lorain Journal Co. v. United States,* 1951, 342 U.S. 143, 72 S.Ct. 181.

Finally, it may be asserted that each of the alleged manufacturer respondents does business on the basis of brand names. Their extensive advertising is well

known and they attempt to lure the customer by brand preference. Thus the success of the alleged use of Broadway-Hale's use of monopolistic buying power was not inconsequential or limited. A mere mention of the brand names admittedly deprived petitioner by this scheme shows significant fruition:

> R.C.A., General Electric, Philco, Admiral, Emerson, Zenith, Whirlpool, O'Keefe & Merritt, Tappan.

These brands were not denied petitioner by reason of any asserted fault on his part, but because his competitor had sufficient power to eliminate these brands from interstate sale and transportation for delivery to Klor.

II.

THE COMPLAINT AND THE PROCEEDINGS BELOW INVOLVED UNDENIED PUBLIC WRONGS WHICH WERE NOT DISPOSED BY THE AFFIDAVITS OF THE DEFENDANTS.

A. Summary judgment is not a substitute for a trial but only allows the determination of whether there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

1. Summary judgment affidavits which do not deny the entry into restraints of trade, which do not purport to meet the genuine issues of a complaint, and which fail to give the Court material and relevant information within the sole knowledge of the moving party cannot form the basis of a valid summary judgment ruling.

This Court has had recent occasion to reverse a summary judgment ruling originally in favor of a plaintiff under the antitrust laws. *Lawlor v. National Screen Service Corporation,* 1957, 352 U.S. 992, 77

S.Ct. 526. In a *per curiam* opinion the Court agreed with the Court of Appeals that summary judgment could not have been entered on the record before the lower Court. The Third Circuit had stated, 238 F.2d 59, 65:

> "It is well-settled that summary judgment may be granted only if the pleadings, depositions, admissions and affidavits '* * * show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' Fed.R.Civ.P. 56 (c), 28 U.S.C.; see F. A. R. Liquidating Corp. v. Brownell, 3 Cir., 1954, 209 F.2d 375. Any doubt as to the existence of a genuine issue of fact is to be resolved against the moving party. Sarnoff v. Ciaglia, 3 Cir., 1947, 165 F.2d 167, 168. Further, documents filed in support of a motion for summary judgment are to be used in determining whether issues of fact exist and not to decide the fact issues themselves. Frederick Hart & Co. v. Recordgraph Corp., 3 Cir., 1948, 169 F.2d 580."

Further, it appears well settled that the pleadings upon which the motion is based are to be liberally construed in favor of the party opposing the motion. *Purity Cheese Co. v. Frank Ryser Co.,* 7 Cir., 1946, 153 F.2d 88, *Hoffman v. Babbit Bros. Trading Co.,* 9 Cir., 1953, 203 F.2d 636; *Anderson v. United States,* 2 Cir., 1950, 182 F.2d 296.

As stated in 6 Moore, *Federal Practice,* Second Edition, Section 56.15(3), pages 2123-2125:

> "The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issues as

> to all material facts, which under applicable principles of substantive law, entitle him to judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. Since it is not the function of the trial court to adjudicate genuine factual issues at the hearing on the motion for summary judgment, in ruling on the motion all inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion."

It is respectfully submitted that the affidavits of the respondents below did not satisfy these strict standards. At the outset it is noted what factors known to the respondents have been omitted by these affidavits.

1. The dollar amount of the purchases made by the respondent Hale from the co-respondents.

2. The nature and manner in which the respondents transacted their business with retail stores in the San Francisco area.

3. The number of retail stores operated by Broadway-Hale and how sales were transacted with this account.

4. The manner in which the respondents classified their accounts. Whether or not Broadway-Hale was a special account and received favorable treatment.

5. The reasons for the demonstrated refusal to deal with petitioner.

6. The basic economic facts with respect to Broadway-Hale and its operations during the period of time involved.

Manifestly the affidavits of respondents were tied to their motion for dismissal and were only directed to the concept of "public injury".

Thus, it is respectfully submitted, the affidavits were not directed to the material issues raised by the complaint.

B. Since the proceedings below involved a conspiracy to refuse to deal, which is per se forbidden by the antitrust laws, there were genuine antitrust issues in dispute.

1. The affidavits of respondents did not meet the question of the existence of this conspiracy.

As has been indicated the petitioner's complaint clearly charged a conspiracy among all the respondents, and that pursuant to this conspiracy the petitioner was unable to obtain the products of the respondents at the scheme of Broadway-Hale. The affidavits of respondents as has been shown, show this refusal to deal, and do not offer any reason for the refusal. Yet under the *Binderup* case, supra, this is per se illegal conduct even though directed at a single trader. Such a charge can only be settled by the trier of fact, in this case the jury, unless there is a demonstration that beyond a doubt such a conspiracy was not entered into. No such showing was made below.

In petitioner's petition for a writ of certiorari it was urged that the antitrust laws condemn *"the* contract, combination or conspiracy" when per se illegality is involved. *United States v. Socony Vacuum*

Oil Co., Inc., 1940, 310 U.S. 150, 60 S. Ct. 811 footnote 59, at 310 U.S. 150, 224, 60 S.Ct. 811, 845.

Under the conspiracy charge in the complaint, petitioner was striking at a plan and a concert designed to oppress him and prevent his competition to Broadway-Hale. The entry into such a combination is manifestly a public wrong when the parties actually agree to refuse to sell their products to the petitioner for such a purpose. A group boycott is illegal per se. *Northern Pacific Ry. Co. v. United States*, 1958, 356 U.S. 1, 78 S.Ct. 514; *Kiefer Stewart v. Seagram & Sons*, 1951, 340 U.S. 211, 71 S.Ct. 259.

It is respectfully urged that the proceedings below raised a bona fide showing which should have raised a judicial doubt as the non-existence of the group refusal to deal, as follows:

1. The affidavits of the respondents showed the refusal of the respondents to sell their products to petitioner.

2. The affidavits did not set forth any reason for this refusal.

3. The allegations of the complaint alleging conspiracy were not controverted.

4. The affidavits were devoid of a convincing factual basis to support the conclusion that Broadway-Hale was not using chain buying power as alleged in the complaint.

5. The products of the petitioner were shown to be not sold on an exclusive franchise basis but were apparently available to other dealers.

C. Since the proceedings below involved both monopolistic power by a large chain buyer of merchandise and an intent to monopolize a part of an area affecting a substantial amount of interstate commerce, there were genuine antitrust issues in dispute.

1. The affidavits of respondents did not meet the issues of monopoly power and specific intent to monopolize.

It is respectfully submitted that the proposition advanced by the Courts below is that a chain buying retailer with monopolistic power (Complaint, Pr. 5, p. 5, Pr. 6, p. 10, Pr. 6 g., h., p. 11, Pr. 8, 11-12) can organize a group boycott against its competitor without liability under the antitrust laws even though it is engaged in interstate commerce and even though a substantial amount of interstate commerce is affected by such activities.

It is further respectfully urged that the Court of Appeals below reached this conclusion through an erroneous interpretation of *Times Picayune Pub. Co. v. United States,* 1953, 345 U.S. 594, 78 S.Ct. 891. Thus a key to the Court of Appeals' opinion seems to be at R. 171-172 wherein it is stated:

> "If a business transaction and the effect and object of such transaction between two or more persons is lawful, then the transaction cannot be nor can it create an unlawful conspiracy. If 'X Company', a manufacturer, refuses to sell to Klor's Inc., and sells to 'Y Company', a retailer who also agrees to buy from 'X' as long as 'X' does not sell to Klor's, more than one person is involved and they have agreed not to sell, but their act is not necessarily illegal".

But whether or nor there is a conspiracy or a combination directed at a competitor is a question of fact which cannot be decided on summary judgment in the absence of strong and convincing demonstration which erases any judicial doubt as to the non-existence of the conspiracy. *United States v. Interstate Circuit, Inc.*, 1939, 306 U.S. 208, 59 S.Ct. 467.

Times Picayune to the Court below meant that an antitrust case must *always* involve market control. But clearly when an action involves a conspiracy per se in restraint of trade, market control is not an indispensable issue. (Id., at 345 U.S. 594, 614-615, 624-625; 73 S.Ct. 883-884, 889.)

Market control was decisive in the *Times Picayune* case because it was a tie-in case in which a single newspaper corporation which owned a morning and afternoon newspaper adopted a policy of selling advertising space only if the customer used both newspapers. This was alleged by the United States to have adversely affected the single competitor to the Times Picayune, the Item, and potential competition. After a complete trial which showed the exact market situation, this Court then held that the District Court had erroneously held that method of doing business as chosen by Times Picayune was a violation of Sections 1 and 2 of the Sherman Act. Thus the following may be said as to *Times Picayune* in relation to this action: (a) Times Picayune was a tie-in case. This is a conspiracy case; (b) Times Picayune was concerned with a simple business practice which may or may not have an intended effect of oppressing a compet-

itor. This action involves not a simple business practice, but the organization of a conspiracy directed at a competitor which can have no other conceivable purpose than the direct harm of a competitor. (c) Times Picayune did not involve the direct elimination of business opportunities of a competitor, but only the ability of the general advertising public to place advertisements, with an asserted effect on a competitor which the evidence failed to prove. (d) Times Picayune did not involve "Bold, relentless, predatory commercial behavior"; (e) This Court specifically met the problem of "specific intent" under Section 2, in *Times Picayune,* and held that the record did not support the conclusion that a specific intent to monopolize had existed. In the instant case the Court of Appeals did not apparently examine the question of the "specific intent" of Broadway-Hale to monopolize a part of interstate trade and commerce in violation of Section 2 of the Sherman Act. That one holding monopolistic power is in per se violation of Section 2 when it uses its power to cause a withholding of *some* custom from a single competitor who has not been entirely eliminated from competition is the direct ruling, however, of *Lorain Journal Co. v. United States,* 1951, 342 U.S. 143, 72 S.Ct. 181.

Since the complaint of the petitioner directly raised the monopolistic buying power of the defendant Broadway-Hale and alleged that this power was used to deny him custom and to afford Broadway-Hale special favoritism and treatment, the issues of monopoly power and the specific intent of Broadway-Hale to monopolize were clearly before the Courts below.

It is respectfully submitted that the record below could not possibly allow a judicial ruling that such monopoly power or a specific intent had not existed.

1. The record below which showed competition to Broadway-Hale was in terms of numbers only. Broadway-Hale could have exercised 99.9% of the dollar volume of sales or purchases of the respondents' merchandise in the San Francisco area consistent with the affidavits.

2. Broadway-Hale could have exercised complete monopoly control in other cities or areas where it operated stores consistent with the affidavits.

3. Broadway-Hale could have eliminated one or dozens of other competitors consistent with its affidavits, and not disclosed by it in its affidavit before the Court.

4. Broadway-Hale could have acquired one or a dozen of competing retail dealers or retail stores in San Francisco or elsewhere consistent with its affidavit.

5. Broadway-Hale could have embarked on a plan or program to deny to any competitor it so chose access to the respondents' merchandise consistent with the affidavits.

6. Broadway-Hale could have been established as the sole "cream" or "favored" account of the respondents consistent with the affidavits.

And aside from the lack of reliable information before the Court on the issues of monopolistic power and specific intent, the record affirmatively discloses factors consistent with a monopolistic purpose in vio-

lation of Section 2 of the Sherman Act: (a) The singling out of petitioner, a direct competitor, to cause a refusal to deal by its suppliers; (b) the failure to disclose the information relevant to these issues; (c) the failure to deny the statements of petitioner's complaint raising its conspiratorial conduct and its refusal to do business unless Klor did not receive merchandise; (d) the ability of Broadway-Hale to procure the supplies denied Klor.

The expressed statements of this Court in *Times Picayune* and *Lorain Journal* that the antitrust laws strike down at the possibility of control and condemn attempts at control, unsupported by actual control itself, have been, it is respectfully submitted, dealt with in the most summary fashion.

It is respectfully submitted that the proceedings below disclose the following. The petitioner below filed a bona fide complaint charging that the respondents had entered into conspiracies in restraint of trade by refusal to deal with petitioner and by discriminating against him in favor of his competitor Broadway-Hale. Further the complaint directly raised the use of monopolistic buying power by Broadway-Hale and that it organized such a conspiracy to injure its competitor. This complaint raised triable issues of fact under Section 4 of the Clayton Act. The respondents did not meet these triable issues of fact in their affidavits in support of their motion for dismissal and summary judgment but introduced matters which were not entirely i. nsistent or contradictory with the contentions raised in the complaint. These affidavits were however held to be sufficient to have

sustained the difficult burden of proof in summary judgment procedure that the moving party convince the Court that there exists no triable issues of fact. This was so because of the legal proposition advanced that Section 4 of the Clayton Act does not afford a private trader direct remedial rights against conduct forbidden by the antitrust laws, but that such an action is subsidiary to the showing of a "public injury".

But, it is respectfully urged, this Court has held that the antitrust laws protect the liberty of a single trader to engage in business, and that a restraint of this liberty is a restraint of interstate trade and commerce upon the showing of the buying, or leasing of commodities from interstate companies or other matters of interstate commerce. Further, this Court has directly rejected the concept that liability under the antitrust laws depends upon a showing of such a "public injury".

CONCLUSION.

It is respectfully submitted that the judgment of the Court of Appeals below be reversed.

Dated, San Francisco, California,
November 21, 1958.

IRVIN GOLDSTEIN,
MAXWELL KEITH,
Attorneys for Petitioner.

(Appendix A Follows.)

Appendix A

Federal Rules of Civil Procedure, Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. As amended Dec. 27, 1946, effective March 19, 1948.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although

there is a genuine issue as to the amount of damages. As amended Dec. 27, 1946, effective March 19, 1948.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits: Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as shall be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the mo-

tion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

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No. 70

In the Supreme Court of the United States

OCTOBER TERM, 1958

KLOR'S, INC., PETITIONER

v.

BROADWAY-HALE STORES, INC., ET AL.

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 76

KLOR'S, INC., PETITIONER

v.

BROADWAY-HALE STORES, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

STATEMENT

Petitioner, Klor's, Inc., operates a retail store on Mission Street in San Francisco, California (R. 5). Respondents are Broadway-Hale Stores, Inc., also a retailer on Mission Street; ten manufacturers of certain products (radios, TV sets, phonographs, refrigerators, stoves, clothes washers and driers); and ten distributors of these manufacturers (R. 5–8).

Petitioner's complaint charged that respondents have conspired to restrain and monopolize commerce in the foregoing products, in violation of Sections 1 and 2 of the Sherman Act. Specifically, the complaint alleged that the manufacturer-distributor re-

spondents have discriminated against Klor's in favor of Hale by selling to Hale at substantially lower prices, by furnishing Hale services and allowances not equally accorded Klor's, and by refusing to sell their products to Klor's (R. 9–11). It further alleged that Hale, as the operator of "a chain of key stores" in the Pacific Coast area (R. 11), has used its monopolistic buying power to obtain from the other respondents preferential terms and conditions, and to purchase from them upon the condition that they not sell their products to petitioner (R. 11–12).[1] In conclusion, the complaint averred that the conspiracy has seriously injured Klor's business and caused it great loss of profits, good will, reputation and prestige (R. 12).

The respondents moved for summary judgment, submitting uncontested affidavits showing (1) that a large number of competing brands not covered by the charges of the complaint are sold in San Francisco, and (2) that many San Francisco retailers, including numerous retail stores on Mission Street within five or six blocks of petitioner's store, sell the brands covered by the complaint's charges (R. 122–125, 128–129). The district court granted the motion upon the ground that the complaint did not set forth a cause of action under the Sherman Act (R. 133–134).

The court of appeals, relying primarily upon *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, affirmed (R. 148–

[1] The allegations as to discrimination are also reflected in counts under the Robinson-Patman Act, but these counts were severed from the Sherman Act count and are not involved here (R. 153–154).

180). It held that the Sherman Act's prohibition of "unreasonable" restraints of trade requires a showing that the public is or may be injured by the restraint, and that on the facts standing admitted, actual or potential prejudice to the public was negatived (R. 160–180). The court stated that concerted conduct "directed at harming the opportunity of a single trader to compete" (R. 172) is not an unreasonable, prohibited restraint if, notwithstanding such restraint, the market is subject to strong competitive forces and defendants have neither sought nor obtained power to exercise market control (R. 172–180).

THE GOVERNMENT'S INTEREST IN THE QUESTION PRESENTED

The Court's determination of the question presented, i. e., whether a showing of injury to the consuming public (in terms of actual or intended market control or substantial effect on the overall market) is essential to establish a Sherman Act violation, will affect public as well as private suits brought under the Act, and is of obvious concern to the United States. Further, the ruling below, if upheld, will militate against the effectiveness of private treble damage and injunctive suits based on violation of the antitrust laws. Such suits were authorized by Congress as a means of deterring illegal restraints and monopolizations of trade, and they are an important supplement to Government enforcement of the statute.

ARGUMENT

THE COURT BELOW ERRED IN HOLDING THAT A CONSPIRACY TO BOYCOTT A TRADER DOES NOT VIOLATE THE SHERMAN ACT ABSENT A SHOWING OF INJURY TO THE CONSUMING PUBLIC IN TERMS OF ACTUAL OR INTENDED MARKET CONTROL OR SUBSTANTIAL EFFECT ON THE MARKET

1. The ruling below was that the facts standing undisputed on the motion for summary judgment disclose no Sherman Act violation. It is, therefore, appropriate initially to consider what are these undisputed facts. On the motion for summary judgment, it was undisputed that 10 manufacturers and their affiliated distributors had conspired with each other and with petitioner's competitor, Hale, not to sell their products to petitioner. The complaint so alleged and the facts averred in respondents' affidavits in no way contradicted or qualified the allegation. It was also undisputed that this conspiracy not to deal, or boycott, was engaged in for anti-competitive reasons. There is no affidavit contradiction of the complaint allegation that, as a part of the conspiracy, Hale used its monopolistic buying power to deny to petitioner its "competitive position" in the purchase and sale of respondent manufacturers' products, and that Hale purchased these products upon the condition that they not be sold to petitioner (R. 11–12). The facts set forth in the affidavits establish, additionally, that many manufacturers other than respondents also sell products of the kind embraced by the complaint, and that respondents' products are offered for sale in many San Francisco stores, including many near petitioner's store.

2. A further preliminary question presented by the appeal is whether a conspiracy to restrain the trade of a single concern comes within the Sherman Act's prohibitions. Ordinarily conduct which the Act prohibits has its main impact on the public at large or on a group or class of similarly circumstanced traders. But it is settled that the statutory prohibitions equally embrace conspiracies in restraint of trade or attempts to monopolize aimed at injury or destruction of a single trader. *Binderup* v. *Pathe Exchange*, 263 U. S. 291; *Lorain Journal* v. *United States*, 342 U. S. 143. Accord: *Loewe* v. *Lawlor*, 208 U. S. 274; *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443; *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters' Assn*, 274 U. S. 37.

If this question were otherwise doubtful, it would be set at rest by the fact that the common law doctrine of restraint of trade was largely developed with reference to restraints upon the activities or business of an individual (*United States* v. *Addyston Pipe & Steel Co.*, 85 Fed. 271, 281 (C. A. 6), affirmed, 175 U. S. 211; *Standard Oil Co.* v. *United States*, 221 U. S. 1, 54), plus the fact that the Sherman Act is to be interpreted in the light of common law concepts of restraint of trade and monopoly. The terms of the statute, "at least in their rudimentary meaning, took their origin in the common law", and Congress intended that the "standard of reason which had been applied at the common law" should be used as the measure for determining the conduct prohibited by the Act. *Standard Oil Co.* v. *United States*, 221 U. S.

1, 51, 60. "The common law doctrines relating to contracts and combinations in restraint of trade were well understood long before the enactment of the Sherman law"; Congress, in enacting the Sherman Act "took over that concept"; and the restraints at which the Act is aimed "are only those which are comparable to restraints deemed illegal at common law". *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 497–498.

3. We submit that the court below misinterpreted this Court's decision in *Radovich* v. *National Football League*, 352 U. S. 445. In that case the court of appeals had held that the complaint did not set forth a violation of the Sherman Act because the facts alleged were insufficient to support the conclusion that defendants' conduct was "calculated to prejudice the public or unreasonably restrain interstate commerce." *Radovich* v. *National Football League*, 231 F. 2d 620, 623 (C. A. 9).[2] This Court, in reversing the decision below, held that Congress "has, by legislative fiat, determined" that the activities prohibited by the Sherman Act "are injurious to the public" (352 U. S. at 453). It explicated its holding that the boundaries of the statutory prohibitions are not to be determined upon the basis of a court's appraisal of what conduct is or is not injurious to the public, by appending a footnote quoting the statement in *Standard Sanitary Mfg.*

[2] The court of appeals had also quoted with approval from *Feddersen Motors* v. *Ward*, 180 F. 2d 519 (C. A. 10), that "it is essential that the complaint allege facts from which it can be determined as a matter of law that * * * the conspiracy was reasonably calculated to prejudice the public interest by unduly restricting the free flow of interstate commerce" (*ibid.*).

Co. v. *United States*, 226 U. S. 20, 49: "*The law is its own measure of right and wrong*, of what it permits, or forbids, and *the judgment of the courts cannot be set up against it*", and the statement in *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 493, that the activities forbidden by the Sherman Act "*had come to be regarded as a special form of public injury*". (Emphasis in original.)

In the instant case, the court below said that this Court's *Radovich* decision meant that courts are "not to come to their own philosophical conclusions as to what restraints of trade should be prohibited" (R. 167). We submit that the court below nevertheless did this very thing. It said that the complaint must allege "a prohibited restraint" and that, while it need not "allege" that the public has been injured, in order "to have the prohibited restraint there must be facts from which it can be determined that the 'conduct charged * * * was reasonably calculated to prejudice the public interest by unduly restricting the free flow of commerce'" (R. 173). In short, the decision was that conduct "calculated to prejudice the public" is an essential ingredient of the statutory prohibition, that public injury is an integral part of the so-called "rule of reason", and that courts must necessarily decide what conduct is or is not prejudicial to the public. But in *Radovich* this Court did not reverse upon the ground that it concluded, contrary to the court below, that the facts alleged showed injury to the public. Reversal was upon the ground that Congress had made its own determination of the conduct prohibited,

thereby foreclosing attempted judicial exercise of the function of weighing possibly conflicting public-interest considerations.

4. In the present posture of the instant case, it stands admitted that respondents' conspiracy restricted petitioner's competitive position, by denying to it opportunity to purchase and resell particular brands of radios, TV sets, refrigerators, etc. Whether or not the brands from which it was thus barred were the most highly advertised and best selling brands, it stands admitted that the conspiracy seriously damaged petitioner's business and caused it great loss of profits, reputation, and prestige. We submit that these facts bring the respondents' conduct within the condemnation of the Act; that Congress has in the Sherman Act declared that such conduct is unlawful and injurious to the public interest; and that a plaintiff so injured need not, as an essential and additional element of his cause of action, show that the injury to his competitive position is also accompanied by other measurable injuries to the public interest.

This Court has always construed the Sherman Act as designed to protect freedom of competition against restriction thereof by conspiracy or other concert of action. In *Northern Securities Co.* v. *United States*, 193 U. S. 197, 337, it said that what Congress did by the Sherman Act "was to prescribe as *a rule* for *interstate and international* commerce * * * that it should not be vexed by combinations, conspiracies or monopolies which restrain commerce by destroying

or restricting competition". In *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, 397, the Court said that "it cannot be doubted that the Sherman Law and the judicial decisions interpreting it are based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition." Recently in *Northern Pacific Railway Co.* v. *United States*, 356 U. S. 1, 4, the Court said:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition. * * *.

The present case illustrates the pitfalls inherent in reading out of the statute a conspiracy admittedly restrictive of competition, because the plaintiff has not gone further in showing that the conduct of the defendants is "calculated to prejudice the public." It is consistent with uncontradicted allegations of the complaint that petitioner was boycotted because he was the leading recognized price-cutter among San Francisco retailers of the products covered by the com-

plaint.[3] This would be concert of action designed to curb or eliminate price cutting, and to maintain and stabilize retail prices. Furthermore, if petitioner may be thus boycotted, others may be similarly boycotted because of their price competition. There conceivably may be difference of opinion among economists and business men as to whether the public benefits in the long run from a policy of free price competition, but the Sherman Act does not leave the question open. The Act bans all combinations to tamper with, stabilize or control price (*United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 221–223), and in this matter the statute provides "its own measure of right and wrong, * * * and the judgment of the courts cannot be set up against it" (*supra*, p. 7).

5. This Court has frequently held or declared that the restraints imposed by group refusals to deal are illegal *per se*.[4] A commentator has observed: "Such action offends the concept of a free market because it places involuntary restraints on the trading opportunities of strangers to the group." Barber, *Refusals to Deal under the Antitrust Laws*, 103 Univ. of Pa. L. Rev. 847, 875. However, the present case does not require

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[3] We believe that, on the issue of whether a cause of action is stated, the complaint is to be viewed as charging a boycott of this kind. A complaint is not to be dismissed unless "nothing can be extracted from this bill [the complaint] that falls under the act of Congress." *Radovich*, *supra*, 352 U. S. at 453.

[4] *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U. S. 457, 467–468; *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 522; *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211, 214; *Times-Picayune Pub. Co.* v. *United States*, 345 U. S. 594, 625; *Northern Pacific Ry. Co.* v. *United States*, 356 U. S. 1, 5.

application of the *per se* rulings because the facts standing admitted show no justification for the boycott, such as elimination of economically or socially undesirable practices,[5] which might lead a court to conclude that under all the circumstances respondents' restrictions on petitioner's competitive opportunities constituted a reasonable restraint.

6. We believe that the court below erroneously concluded that the excerpts which it quoted from the opinion in *Apex Hosiery Co.* v. *Leader,* 310 U. S. 469, constitute, or were intended to be, a categorical definition or delimitation of the scope of the Sherman Act. That was a proceeding under the Act to recover treble the damages caused by a sit-down strike, and the Court assumed that the necessary consequence of the defendants' combination was to prevent interstate shipments. The issue which the Court considered and decided was whether the interference with interstate commerce resulting from the labor dispute in which the defendants were engaged gave rise to "the kind of restraint of trade or commerce at which the Act is aimed * * *." 310 U. S. at 487.

The Court said that the statute is not aimed at "policing" interstate transportation or the interstate movement of goods, in the sense of safeguarding interstate commerce against any and all interruption caused by violence or other tortious conduct. *Id.,* at 487, 490–491. Rather, the Act's purpose, this Court said, was to prevent suppression of "competition in

[5] Cf. *Fashion Originators' Guild* v. *Federal Trade Commission,* 312 U. S. 457, where prevention of style piracy was rejected as a defense to a group boycott.

the marketing" of goods and services and restraints upon "free competition in business and commercial transactions". *Id.* at 493. It said that it had never applied the Act unless it believed that there was some form of restraint upon "commercial competition in the marketing of goods or services" (*id.* at 495), and that in all of its decisions "some form of restraint of commercial competition has been the *sine qua non* to the condemnation of contracts, combinations or conspiracies under the Sherman Act" (*id.* at 500). Certain prior decisions which had held that what had been done in the course of a labor dispute violated the Act were explained as coming under the Act only because the defendants' activities "were directed at control of the market and were so widespread as substantially to affect it". *Id.* at 506.

The whole emphasis of the opinion is on pointing up the distinction between a combination having a commercial objective and one without such objective where interference with competition or market forces is a fortuitous by-product of the combination. Any generalized statements in *Apex* as to what the statute proscribes were related to the Court's basic holding that the statute has only very limited application to combinations having non-commercial objectives. We submit therefore that the court below erred when it viewed *Apex* as enunciating the doctrine that a combination, even when its purpose is commercial, is outside the Sherman Act unless (a) the restraints imposed are unreasonable *per se* or (b) it appears that there is actual or intended market control or that price

or supply in an interstate market will be substantially affected.

7. In conclusion, we submit that the decisions of this Court establish that the provisions and policy of the Sherman Act comprehensively protect the basic right of the individual entrepreneur to conduct his business free of coercive restraint by competitors or suppliers. Violation of that right is condemned by the Act, which implicitly presupposes that conduct which it forbids is injurious to the public. It is not necessary for a plaintiff injured by such restraints to make a separate and additional showing of independent injury to the public in other respects. Were it otherwise, those bent on restrictive trade policies would be enabled to pursue those policies at large by making a few conspicuous examples of nonconforming individual traders.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 76

KLOR'S, INC.,
Petitioner,

v.

BROADWAY-HALE STORES, INC., et al.,
Respondents.

Brief for Respondents

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 76

KLOR'S, INC.,
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Respondents.

Brief for Respondents

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

This brief is filed in reply both to Petitioner's Opening Brief and the Brief for the United States as Amicus Curiae, hereafter referred to as the "Solicitor General's Brief."

OPINIONS BELOW

The opinion of the Court of Appeals (R. 148-180) is reported at 255 F.2d 214. The opinion of the District Court (R. 133-134) and its Order and Judgment (R. 135-136) are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 28, 1958 (R. 181). The jurisdiction of this Court was invoked

All emphasis in quotations in this brief has been added unless otherwise stated.

under 28 U.S.C. § 1254(1), and the petition for writ of certiorari was granted on October 13, 1958 (R. 182).

STATUTES INVOLVED

The Sherman Act, §§ 1 and 2; Act of July 2, 1890, c. 647, §§ 1 and 2, 26 Stat. 209, as amended July 7, 1955, c. 281, 69 Stat. 282.

Sec. 1:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *"

Sec. 2:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *."

Clayton Act, § 4; Act of October 15, 1914, c. 323, § 4, 38 Stat. 731:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

QUESTIONS PRESENTED

Petitioner's brief (p. 4) erroneously states that the question is whether a single trader injured by conduct forbidden by the Sherman Act may recover. To such a question the answer, of course, is yes. But the actual question is whether the conduct complained of

was forbidden or was merely a private controversy for resolution in state courts under state law. Specifically, the situation here presented and the questions involved are these:

A retailer conditions its purchase of certain brands of household appliances—a few of the many on the market—on willingness of the suppliers of those brands not to sell them to petitioner, a retailer next door who is but one of over 40 in the neighborhood and one of hundreds if not thousands in the city. A Sherman Act suit is filed. Affidavits on a motion for summary judgment, together with the allegations of the complaint, establish that the alleged conspiracy (to refrain from selling the named brands to petitioner) is neither aimed at nor strikes a class of persons but petitioner alone; is neither aimed at nor strikes any other retailer; is not intended to have and in fact does not have any effect on prices, on the availability of any product to the public, on the quality thereof, or on the availability to petitioner of innumerable competing brands. Further, the affidavits establish that no monopoly is involved, and that no injury whatever to the public was intended or effected.

In this situation:

1. Is the alleged conspiracy one "in restraint" of trade or commerce at all as the term "restraint" is used in the Sherman Act?
2. If so, is it an "unreasonable" restraint?
3. Does it have that substantial relationship to interstate commerce requisite to the application of the Sherman Act?

STATEMENT OF THE CASE

This case must be decided upon its own particular facts. We say this at the outset because the petitioner, and much more so the Solicitor General in his brief as amicus curiae, dissociate themselves from the facts of the case in an effort to read into the decision below more than is there.

The facts of *this* case are those stated in the opinion of the Court of Appeals, no more, no less.[1] And that court has said that "The facts prove no more than a squabble between two of many competitors in a highly competitive market area" (R. 180). The District Court made the same observation when it said "It is purely a private quarrel * * *" (R. 134).

A. The parties and the proceedings below.

Petitioner is a retailer of household appliances in a shop on Mission Street in San Francisco (R. 5). Mission Street is one of the secondary shopping districts outside the San Francisco downtown area. Respondent, Broadway-Hale Stores, Inc. (hereafter called "Hale"), is a retailer of appliances, having a number of stores, one of them on Mission Street next door to petitioner's shop (R. 5).

The 18 other respondents consist of ten manufacturers—two manufacturers of gas stoves, two of washers and dryers, three of refrigerators, two of electric ranges, one of phonographs, and seven of radios and television sets—and of eight local wholesale distributors of some of these manufacturers (R. 6-8).

Petitioner filed suit against respondents in 41 counts (R. 19). All were parties defendant to the first count but not to the others. Count One, like the other counts, contained allegations of discrimination, but respondents moved to clarify the confusion of parties and grievances, and a stipulated (R. 142-144) pre-trial order resulted, providing that Count One (R. 20)

> "is and shall in all further proceedings be interpreted and construed as one seeking relief solely with respect to a con-

1. Not only has petitioner never asserted that the opinion fails to state the facts correctly, but this Court has said that it exercises its certiorari jurisdiction to review principles of law, the settlement of which is of importance to the public, not to review the factual appraisal of a particular case by a Court of Appeals, particularly where that court's appraisal concurs with that of the District Court. *Labor Board v. Pittsburgh Steamship Company*, 340 U.S. 498, 502; *Federal Trade Commission v. Standard Oil Co.*, 355 U.S. 396, 400.

spiracy under the Sherman Act (Act of June 2, 1890, c. 647, as amended, 15 U.S.C.A. Sections 1 and 2), and not as seeking to assert any claim for relief under the Robinson-Patman Act (Act of June 19, 1936, c. 592, § 1, 15 U.S.C. § 13."

By virtue of this order Count One presented, in the words of the District Court (R. 134):

"just the case of a retail store in the Mission District of San Francisco—one of hundreds in the city engaged in selling the same kind of merchandise—which has a plaint that certain supplier defendants won't sell it some merchandise, allegedly at the behest of one of its competitors."

Or, in the words of the Court of Appeals:

"By pre-trial order count one was limited to a single conspiracy charging a Sherman Act violation" (R. 154)

* * * * * * *

"the restraint relied on * * * was in preventing plaintiff from obtaining *certain* electrical appliances for resale, while at the same time permitting Broadway-Hale to purchase those *certain* electrical appliances. This is a simple refusal to sell, allegedly by joint action." (Italics are the court's (R. 171)[2]

A series of orders ensued under R.C.P. Rule 42b, "by virtue of which Count One of the complaint and the claim for relief tendered thereby are to be treated in all respects as if they constituted a separate action" (R. 135). This appeal concerns Count One alone.

Respondents then moved for summary judgment on Count One (R. 22, 128, 130, 132). The motion was supported by twelve affidavits (R. 25-125). Petitioner filed no affidavits in opposition,

2. By virtue of the pre-trial order, the last forty counts became charges solely of violation of the Robinson-Patman Act (R. 19) and thus the vehicle for the charges of discrimination. These forty counts have been otherwise disposed of or are still pending, so that if petitioner has been aggrieved by discriminations, it may recover under those counts.

admitted the facts, and stood on an argument of law. The District Court granted the motion, stating (R. 133):

> "It appears from the allegations of count one of the complaint and from the undisputed affidavits supporting the motion for summary judgment that there is no genuine issue of fact respecting the claim for relief tendered by count one of the complaint."

The Court of Appeals affirmed in a careful opinion by Barnes, J., concluding (R. 180):

> "Construing the complaint and affidavits together, and considering the facts judicially known to this Court and the court below, the motion for summary judgment was properly granted."

B. Nature of the case.

1. THIS IS NOT A PLEADING CASE.

This is not a pleading case. On their first appearance in the case respondents made a motion to dismiss the complaint (R. 16-17). But they were aware of decisions like *United States v. Employing Plasterers Assn.*, 347 U.S. 186, which indicate that on a motion to dismiss limited to a complaint alone the allegations are often broadly construed, and that, if the case lacks merit, "an expensive full dress trial can be avoided by invoking the summary judgment procedure under Rule 56" (p. 189). They therefore asked the court to defer the motion, so that the issue could be decided on a motion for summary judgment where the court could act on undisputed fact.

As the Court of Appeals said (R. 154):

> "It should be noted here that the court below did not rule on the pleadings nor grant the motion to dismiss by reason of any failure therein. While a motion to dismiss was made, it was apparently passed over so that the motion for summary judgment could be determined."

2. THE CHARGE OF THE COMPLAINT; WHAT IT IS AND WHAT IT IS NOT.

Although this is not a pleading case, we start with the charge made by the amended complaint, for so far as respondents' affidavits did not address themselves to an allegation of the complaint, that allegation is to be taken as true for the purpose of the present proceedings.

The charging portions of Count One of the complaint are paragraphs 6 and 8. Paragraph 6 (R. 8) simply alleges that beginning prior to 1952 respondents "have restrained trade and commerce in the interstate distribution and sale" of the described goods in the San Francisco area

> "by contracting, combining, conspiring together, and each with the other, in restraint and monopoly of such trade and commerce * * * and have thereby substantially lessened, limited and restrained competition in said trade and commerce, and *have prevented plaintiff* from obtaining * * * appliances for resale; * * * and have refused to sell to or to enter into any contract to sell the products to *plaintiff*. * * * *More particularly*, the manfacturer-distributor defendants in pursuing a policy in favor of Hale and *against plaintiff*, have done and are continuing to do the following acts: * * *"

which consist of refusals to sell to petitioner (Par. 6, sub d and i).[3]

Paragraph 8 alleges (R. 11-12):

> "The defendant Hale * * * has also used its monopolistic buying power to deny to plaintiff its competitive position in the acquisition, purchase and sale of the products manufactured, distributed and sold by the manufacturer-distributor defendants and, *in particular, has purchased and continues to purchase the products of the manufacturer-distributor defendants upon the condition that the manufacturer-distributor defendants do not sell their products to the plaintiff.*"

This is the whole essence of the charge. In short, Count One is a simple charge that Hale declined to buy from respondent sup-

3. The other subdivisions related to alleged discriminations. See footnote 2, p. 5 *supra*.

pliers if they also sold to petitioner, which had its store next door, and that as a result those suppliers "conspired" not to sell their brands to petitioner.

It is equally important, at the outset, to note what the complaint did *not* charge.

It did not charge that respondents conspired to refuse to sell to a *class* of persons of which petitioner is one. The charge is explicit: the alleged conspiracy was to refrain from selling to petitioner alone (R. 9-10). The complaint did not charge that the purpose of the conspiracy was to compel petitioner to conform to any plan relative to marketing or to punish it for not doing so. It did not charge that the conspiracy had any effect on prices, retail or wholesale, or was intended to; or that it reduced or interfered with the availability of any product to the public, or was intended to; or that it resulted in deterioration of quality of products, or was intended to. The charge, simply, is that the "conspiracy" was aimed at petitioner alone, with no purpose to affect the market and with no effect upon the market.

3. THE ADMITTED FACTS ON THE MOTION FOR SUMMARY JUDGMENT.

The undisputed affidavits filed by respondents in support of their motion for summary judgment (R. 25-125) established:

Petitioner and respondent Hale are not the only retailers of appliances in San Francisco. There are literally hundreds, if not thousands, of others (R. 45-49, 51-53, 55-61, 64-115, 117-119, 122-124). The classified section of the San Francisco Telephone Directory contains fifteen pages of listings (R. 29-43). In San Francisco alone are sold not only the brands of appliances involved in this case but many other competing brands (R. 26-27). In addition to the seven brands of television sets, radios and phonographs mentioned in the complaint, there are twenty other competing brands sold in San Francisco. In addition to the three mentioned brands of refrigerators there are eighteen other competing brands. In

addition to the five mentioned brands of stoves, there are twenty-three competing brands; in addition to the two mentioned brands of clothes washers and dryers, there are thirty competing brands. Among these competing brands are many of the outstanding and most widely advertised brands in the country, including the names Capehart, Crosley, Du Mont, Hallicrafter, Hoffman, Magnavox, Motorola, Packard-Bell, Scott, Westinghouse, Amana, Bendix, Coldspot, Frigidaire, Hotpoint, International Harvester, Kelvinator, Norge, Servel, Chambers, Roper, Thermador, Western Holly (see listing at R. 26-27). Petitioner does not charge that it was denied the right to handle any of this vast number of brands manufactured and sold by companies not parties to the action.

Moreover, numerous other retailers sell to the San Francisco public the very brands referred to in the complaint. At the date of filing suit the number of dealers *in San Francisco* handling these products was as follows:

Admiral products	195 retailers	(R. 45)
Zenith products	153 retailers	(R. 49)
Whirlpool products	67 retailers	(R. 51)
RCA products	127 retailers	(R. 53)
Emerson products	109 retailers	(R. 55)
Philco products	175 retailers	(R. 59)
Rheem products	56 retailers	(R. 64)
GE products	110 retailers	(R. 71)[4]
Olympic products	33 retailers	(R. 117)
Tappan products	13 retailers	(R. 119)
O'Keefe & Merritt products	65 retailers	(R. 122)

Among these retailers are large nation-wide concerns[5] as well as local retailers which both courts below, with their judicial

4. The figure given is for GE television dealers. The figure for GE major appliance dealers is 54 and for dealers in GE radios and traffic appliances it is 463.

5. For example, Butler Bros., R. 67, 72, 84; Macy's, R. 45, 48, 51, 55, 59, 65, 76, 95, 122; Electrolux Corp., R. 88; S. H. Kress Co., R. 94, 113; McKesson-Robbins, R. 96; Walgreen's, R. 108; J. C. Penney Co., R. 49, 100.

knowledge of the community, knew to be some of the largest in the area.[6]

In *the Mission district alone,* in San Francisco, there are 53 dealers selling the brands referred to in the complaint. Restricting the area under consideration even more narrowly, to *Mission Street* alone, a member of the public desiring to purchase an appliance and strolling down Mission Street for a span of but 11 blocks, of which petitioner's store is approximately in the center, would pass the shops of 43 retailers, selling the specific items and brands referred to in the complaint. Defendants' Exhibit A on the motion is a chart that strikingly exemplifies the fact; a copy is inserted opposite this page.[7]

Finally, it may be noted that while the alleged conspiracy is charged as having begun prior to 1952 (R. 9), the number of retail stores in San Francisco selling the items and brands referred to in the complaint steadily increased after 1952 and up to the time of the commencement of the suit. Admiral dealers increased from 150 to 195, and in the Mission District alone from 20 to 36; Zenith from 120 to 153; Whirlpool dealers from 40 to 67; Emerson from 40 to 109 and in the Mission District alone from 13 to 29; Philco from 79 to 175 and in the Mission District alone from 22 to 47; Wedgewood Stove dealers from 41 to 56 and from 8 to 9 in the Mission District alone; General Electric dealers and RCA have run into the hundreds for years and there have

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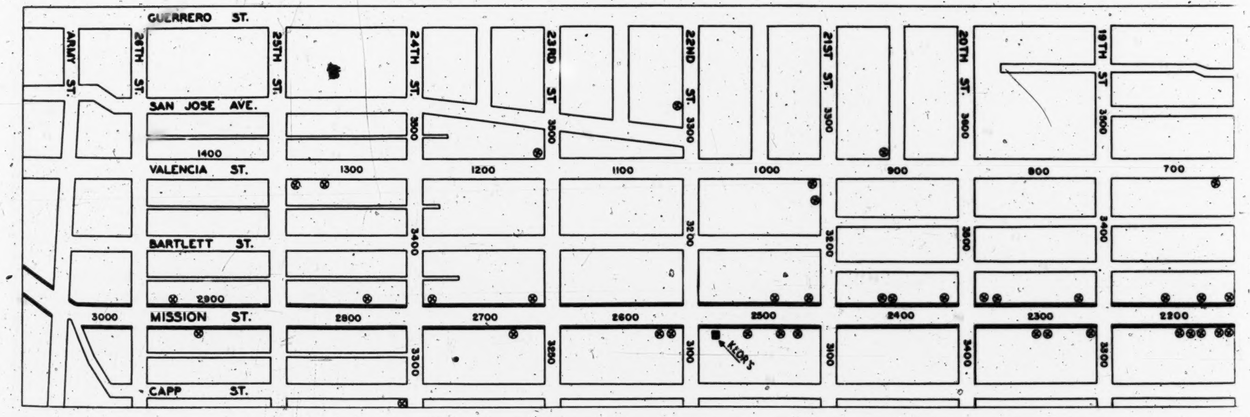
6. For example, City of Paris, R. 48, 55, 59, 73, 85; The Emporium, R. 48, 51, 65, 74, 88, 119, 122; Dohrmann's, R. 49, 65, 67, 73, 87, 119, 122; Schwabacher-Frey, R. 49, 51, 59, 77, 103; The White House, R. 55, 59, 108; I. Magnin's, R. 55; Gump's, R. 91; Sherman Clay & Co., R. 48, 77, 80, 104, 114; Kahn & Keville, R. 68, 75, 93; Lachman Bros., R. 49, 51, 56, 64, 69, 71, 75, 79, 94, 113, 122, 123; Redlick's, R. 64, 69, 71, 76, 80, 101, 113, 122, 123; Scott Plumbing Co., R. 69; Sterling Furniture Co., R. 48, 51, 65, 70, 77, 80, 105, 122; Charles Brown & Sons, R. 45, 49, 59, 72, 84; Union Furniture Store, R. 107, 115, 123; W. & J. Sloane Co., R. 48, 104, and L. R. Jackson Home Wares Co., R. 59, 93.

7. All the data on the chart are taken from the twelve affidavits.

KLOR'S INC. VS. BROADWAY - HALE ET. AL.

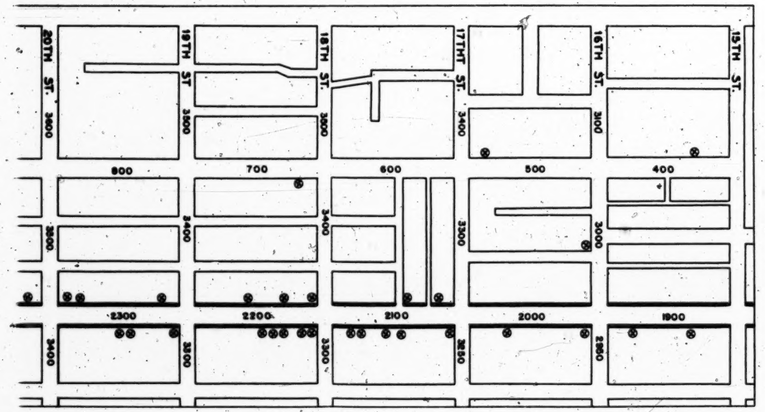
KLEIN'S LEGAL SERVICE
SCALE - 200 FEET TO THE INCH

35294
Dept A
8/10/56
R. Hansen
mo to dis &
for Summ Judgt
and to Ct.



AY - HALE ET. AL.

CHART SHOWING LOCATION OF RETAILERS SELLING DEFENDANTS' PRODUCTS IN THE VICINITY OF PLAINTIFF'S STORE [BASED ON AFFIDAVITS FILED IN SUPPORT OF MOTION FOR SUMMARY JUDGEMENT ON COUNT ONE OF THE COMPLAINT]



Klor's, Inc. v. Broadway-Hale Stores, Inc., 43 61

B. G. M. Radio & TV
2412 Mission Street

Bond Home Furnishings
2224 Mission Street

Henry Brilliant, Jewelers
2351 Mission Street

W. S. Brooks Electric
3349 - 22nd Street

Bunney Hardware
2613 Mission Street

Cgney Refrigeration
590 Valencia Street

Central Appliance
2967 Mission Street

Cherin Furniture Co.
727 Valencia Street

Christophe's
2388 Mission Street

City Wide Refrigerator
1007½ Valencia Street

Clark Furniture Co.
2295 Mission Street

Jack Dougal
2460 Mission Street

Dowd-Bell Electric
2138 Mission Street

Drasas Jewelers
2380 Mission Street

Family Furniture
1943 Mission Street

The Furniture Mart
2189 Mission Street

F & S Enterprises
968 Valencia Street

Galil Furniture Co.
1200 Valencia Street

Gerhardt Strohmeier
2005 Mission Street

Grunat Bros.
2340 Mission Street

Griffin Furniture
440 Valencia Street

Granville's
2512 Mission Street

Hale's
2565 Mission Street

Harvey's
2627 Mission Street

Howes Hardware
2759 Mission Street

Kay Jewelry
2548 Mission Street

Klor's, Inc.
2581 Mission Street

Knox Furniture
2071 Mission Street

S. H. Kress & Co.
2712 Mission Street

Lachman Bros.
16th & Mission Streets

Lee Furniture
2038 Mission Street

Leed's TV
3205 - 21st Street

Mahoney Electric
1375 Valencia Street

M. Mayer Refrigeration Supply
1397 Valencia Street

Mission Music Shop
2974 Mission Street

Mission Reliable
2955 Mission Street

Frank Newman
2141 Mission Street

Pacific Appliance
2456 Mission Street

Pacific Radio & Television
2060 Mission Street

Payless Furniture
2177 Mission Street

Payroliff Appliance Co.
2515 Mission Street

Redlick's
17th & Mission Streets

Sherman Clay & Co.
2531 Mission Street

Shapiro Furniture Co.
2183 Mission Street

Smith Radio & TV
3345 - 24th Street

Stanley's Radio
3043 - 16th Street

Starlight Furniture
2211 Mission Street

State Radio & Music
2796 Mission Street

Strand Service
18th & Mission Streets

United Furniture Co.
2154 Mission Street

Universal Furniture
1975 Mission Street

Wally's TV
2343 Mission Street

Wasmer Furniture
2043 Mission Street

Young Bros. TV
2301 Mission Street

been no material variations. (This evidence appears in the 12 affidavits, R. 25 to 125.)

The sham claim of "monopoly"

While the complaint refers to monopoly and monopolization, and the briefs of both petitioner and the Solicitor General make much of these words, the affidavits on the motion for summary judgment demonstrated that these allegations were sham.

The charge of monopolization is in the following allegations of the complaint: That Hale operates a chain of stores (R. 5, Compl. para. 5); that the "combination, conspiracy and agreement tend to and do actually restrain and monopolize interstate commerce in the distribution and sale" of the named appliances "in favor of Hale" (R. 10, Compl. para. 6); that by reason of Hale's number of retail outlets it "enjoys a monopolistic buying power", has used that power to negotiate terms of purchase, and (as already quoted above) has used it

> "to deny to *plaintiff* its competitive position in the acquisition, purchase and sale of the products manufactured, distributed and sold by the manufacturer-distributor defendants and, in particular, has purchased and continues to purchase the products of the manufacturer-distributor defendants upon the condition that the manufacturer-distributor defendants to not sell their products *to the plaintiff*." (R. 11-12, Compl. para. 8)

The affidavits established (1) that there are hundreds, if not thousands, of retail dealers selling the very brands in question in San Francisco; (2) that there are dozens of competing brands, and (3) that the number of retailers selling the very brands in question in San Francisco has steadily increased during the period of the alleged conspiracy. In view of these undisputed facts, it is clear, as both courts below held, that no genuine issue on monopolization exists.

As the Court of Appeals said (R. 179):

> "The first sentence of paragraph six of count one of plaintiff's complaint is of no assistance to appellant. It alleges only that 'defendants . . . have restrained trade and commerce . . . . by contracting, combining, and conspiring together . . . in restraint and monopoly of such trade and commerce . . . and have thereby substantially lessened, limited and restrained competition in said trade and commerce . . .' This is no more than the pleader's conclusion that defendants have restrained trade and commerce by restraining trade and commerce. It states no facts from which illegal action can be perceived or inferred. Paragraph eight of count one speaks of Broadway-Hale's 'monopolistic buying power' enjoyed 'by reason of the large number of retail outlets it operates.' But the essence of this allegation is that Broadway-Hale 'has purchased and continues to purchase the products of the manufacturer-distributor defendants upon the condition that the manufacturer-distributor defendants do not sell their products to the plaintiff.' We find no basis for determining that Broadway-Hale intended, or had the power if it so intended, to effect such conditions on its purchases in such scope as to appreciably affect competition among retailers generally in their purchases or sales to the public. It is well known that appliance sales are within a most highly competitive market."

4. ERRONEOUS ASSERTIONS BY PETITIONER AND THE SOLICITOR GENERAL AS FACT OF MATTERS NOT PRESENT IN THE CASE.

In a number of respects the briefs of petitioner and of the Solicitor General go outside the facts of this case:

1. The Solicitor-General's brief states (p. 9):

> "It is consistent with uncontradicted allegations of the complaint that petitioner was boycotted because he was the leading recognized price cutter among San Francisco retailers of the products covered by the complaint."

This amazing statement lacks the basis of a single word in the complaint or any other part of the record. Nowhere has there

heretofore been a suggestion that petitioner was a price cutter or that he was denied goods for that reason. The assertion runs counter to the whole basis on which petitioner presented the case to both courts below.

Petitioner has never contended, either in those courts or in this, that there was any price element in the case. On the contrary, it argued that the absence of that element was immaterial. Nor did the Solicitor General's memorandum filed in September, 1958, in support of the petition for certiorari claim the presence of any price element; on the contrary, it recognized that there was none.[8] In arguing the cause in both courts below respondents noted that no element of price was involved, and in reply petitioner merely argued that conspiracies fixing or regulating prices, limiting production or distribution or bringing about a deterioration of quality "are not alone the types of conduct prohibited by the Sherman Act" (R. 129). The opinion of the Court of Appeals describes the case presented to it thus (R. 171):

> "There was no charge or proof that by any act of defendants the price, quantity, or quality offered the public was affected, nor that there was any intent or purpose to effect a change in, or an influence on, prices, quantity, or quality, either directly or indirectly."

2. Both petitioner's brief and that of the Solictor General make arguments based on "elimination" of a trader (e.g., Pet. Br. 42). But this case does not involve "elimination" of anybody. The complaint did not charge that petitioner was "eliminated" but only that certain brands of goods were denied to it. The uncontroverted showing was that many other brands—including some of the most famous in the country—were available to petitioner. As the Court of Appeals said (R. 171):

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8. That memorandum stated (p. 5):
"The unsoundness of the decision below is pointed up by consideration of the categories of *per se* violations. *If* petitioner's store had been the object of a price fixing conspiracy or a tying arrangement the restraint would be deemed *per se* unlawful."

"Here the restraint relied on, as we see from the complaint, was in preventing plaintiff from obtaining *certain* electrical appliances for resale, while at the same time permitting Broadway-Hale to purchase those *certain* electrical appliances. This is a simple refusal to sell, allegedly by joint action. Various other competing electrical appliances were shown by the record before the trial court to be available to Klor's, Inc.[41] * * *

[41] "Twenty competing brands of television sets compared to the seven declared impossible to attain; eighteen competing brands of refrigerators, compared to three; twenty-three stoves, compared to five; thirty competing clothes washers and dryers, compared to two. * * *" (Italics are the court's.)

Again (R. 178):

"Additionally, there are numerous brands of appliances to which plaintiff was not denied access and which compete favorably with those he was denied."

3. Petitioner's brief erroneously asserts (p. 8) that

"The complaint * * * may be summarized as involving the following: * * * (3) A plan by these parties to allow Broadway-Hale a monopolistic position in the sale of their products" and "(5) A specific intent by Broadway-Hale to monopolize the retailing of household appliances."

If this is intended to mean that there was a plan to sell only to Hale, or to refuse to sell to anyone at all that Hale designated, there is not a word in the complaint to that effect. Further, the affidavits established that Hale is but one of thousands of retailers who buy and sell the products. Any assertion of "monopolistic position" in this situation is simply sham.[9]

9. The statement (Br. 42) that Hale "could have eliminated one or a dozen of other competitors" or "could have embarked on a plan or program to deny to any competitor it so chose access to respondents' merchandise," is, similarly, merely sham speculation.

5. THE CASE AS MADE BY THE COMPLAINT AND THE UNDISPUTED SHOWING ON THE MOTION FOR SUMMARY JUDGMENT.

The case made by Count One of the complaint, after the stipulated pre-trial order, and the undisputed showing on the motion for summary judgment, is succinctly summed up by the Court of Appeals thus (R. 178):

> "Count one of the complaint, with which we are here solely concerned, alleges, in paragraph six, that defendant Broadway-Hale, in combination with each of the manufacturing-distributing defendants, prevented *plaintiff* [italics are the court's] from obtaining products to sell to the public. There is no allegation of actual, attempted, or intended control of the market in which plaintiff and defendant Broadway-Hale competed, considering the market to be either the retail sellers of the Mission District of San Francisco, the city itself, or the purchasing public. Defendants' affidavits, submitted under the provisions of Rule 56 of the Federal Rules, as well as the facts of which this Court may take judicial notice leave no doubt that the conduct directed at this particular plaintiff and only at this plaintiff did not and could not have under the circumstances any substantial effect on market competition. * * * there are literally hundreds of dealers in the San Francisco Bay Area dealing in the same kinds and brands of major appliances as plaintiff and defendant Broadway-Hale. On Mission Street, along with the plaintiff and Broadway-Hale, there are over forty retail dealers. Additionally, there are numerous brands of appliances to which plaintiff was not denied access and which compete favorably with those he was denied."

SUMMARY OF ARGUMENT

I. The moving force in the alleged conspiracy was Hale, a retailer. Had it sought and obtained an exclusive on each of the supplier-respondents' brands for the single city block on which Hale is located, there would plainly have been no violation of the Sherman Act. *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir.), cer. den. 355 U.S. 822. But Hale did

not seek or receive even this slight exclusive arrangement. According to the charge, it simply did not desire to handle brands handled by petitioner, a next door neighbor, and it told each supplier-respondent to choose between its custom and petitioner's. The supplier then chose Hale's. A buyer's refusal to buy from a supplier should the latter sell to another, coupled with the supplier's agreement not to do so, is joint action—a two-party agreement—but it is not illegal. *Federal Trade Commission v. Raymond Co.*, 263 U.S. 565; *United States v. Bausch & Lomb Co.*, 321 U.S. 707, 729; *Mackey v. Sears Roebuck & Co.*, 237 F.2d 869 (7 Cir.), pet. for cer. dism. 355 U.S. 865; *Hudson Sales Corp. v. Waldrip*, 211 F.2d 268 (5 Cir.), cer. den. 348 U.S. 821; accord under California antitrust law, *Rolley, Inc. v. Merle Norman Cosmetics*, 129 C.A. 2d 844, 278 P.2d 63.

A number of such two-party agreements, one between Hale and each supplier-respondent, would be equally legal. *Interborough News Co. v. Curtis Publishing Company*, 225 F.2d 289 (2 Cir.). Assuming that all respondents were parties to one agreement, the fact of one multiparty arrangement in place of several two-party arrangements does not create illegality *per se*. The test of illegality still remains the same; i.e., one of purpose, intent and effect on the market or the consuming public.

II. (1) The Sherman Act does not prohibit all conspiracies but only those "in restraint of trade or commerce". The key term, "restraint of trade", does not have a drily literal meaning. *Chicago Board of Trade v. United States*, 246 U.S. 231. This Court early held and ever since has consistently ruled that an injury to the public is the foundation upon which the Act's prohibitions rest. Specifically, it has held that the only conspiracies within the Act are those which, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interest by unduly restricting competition or the course of trade. The Act does not prevent mere injury to an individual, and no private recovery is permissible

for acts not producing that general consequence to the public. *Nash v. United States*, 229 U.S. 373; *Wilder Mfg. v. Corn Products Co.*, 236 U.S. 165; *Mandeville Farms Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, and other cases cited in the Argument.

In *Apex Hosiery Co. v. Leader*, 310 U.S. 469, the Court gave definitive expression to the kind of restrictions on trade with which the Act is concerned. The Court rejected the contention that "the Sherman Act is violated when it is shown that a combination or conspiracy existed which resulted in a restraint of commerce", even where the parties so intended. It held that not all restrictions on trade are "restraints of trade" but only such as tend to a "special form of public injury", viz., restrict production, raise prices, or otherwise control the market to the detriment of purchasers or consumers of goods and services, i.e., tend to take from buyers or consumers the advantages which they derive from free competition in the market.

The restriction of the alleged conspiracy in this case was not even a "restraint of trade", because it neither had nor was intended to have any consequences or effect on the market or to the consumer.

(2) To be illegal under the Sherman Act, not only must a restriction amount to a "restraint of trade" but it must also be "unreasonable". *Standard Oil Co. v. United States*, 221 U.S. 1. While some kinds of agreements or practices have been deemed unreasonable *per se*, because of their inherent nature as having a pernicious effect on competition and because an ascertainment of reasonableness would involve an elaborate economic inquiry, the Court has not receded from the Rule of Reason generally. *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5; *United States v. E. I. du Pont Nemours & Co.*, 351 U.S. 377, 387. Apart from the classic instances of intrinsically anti-competitive practices, such as price fixing and division of territories, there must be a substantial interference with competition in the relevant market as a matter of

fact, a deprivation of the public of the fruits of a competitive order shown by the facts to be likely.

Even assuming that the alleged conspiracy here was a "restraint of trade", yet, unless it is held to be unreasonable *per se*, the judgment must be affirmed, for both courts below have concurred in the fact that there was no effect whatever on the market, either intended or effected. It was, as those courts said, "no more than a squabble between two of many competitors in a highly competitive market." For this reason, petitioner and the Solicitor General seek to extend the *per se* rule to this case. But if the *per se* rule is applicable here, little, if any, room remains anywhere for the Rule of Reason.

(3) The kind of case petitioner presents has frequently arisen, and without exception the courts have held that no violation of the Sherman Act exists, that the Act is not concerned with whether a particular retailer, sales agent, consignee or other dealer handles or sells a particular brand or commodity so long as there are many others selling it, there being no effect and no purpose to work an effect on prices, quality or quantity available to the public and no monopoly, particularly where numerous competing brands are available. Conversely, in every case where the Sherman Act has been held violated, the conspiracy was aimed at or struck a broader purpose or target than the one plaintiff; for example, its purpose was to fix prices, and the plaintiff was injured as an incident to the accomplishment of that purpose. The cases to this effect are numerous. Among them are *Shotkin v. General Electric Co.*, 171 F.2d 236 (10 Cir.) and *Feddersen Motors v. Ward*, 180 F.2d 519 (10 Cir.), which petitioner has conceded support the judgment but contends should now be overruled, and *Hudson Sales Corp. v. Waldrip*, 211 F.2d 268 (5 Cir.), cer. den. 348 U.S. 821.

(4) By virtue of the decisions mentioned in Section II(1) of this Summary, there early emerged and has been repeated in a mul-

titude of cases the statement that in order for there to be a violation of the Sherman Act, there must be a "public injury", and that the Act cannot be invoked in aid of a merely private controversy. This is a compendious mode of stating the principles of *Apex Hosiery Co. v. Leader, supra,* that to constitute a "restraint of trade" a restriction must have certain effects on the market, and also that it must be unreasonable. Petitioner claims that this requirement was "invalidated" by *Radovich v. National Football League,* 352 U.S. 445. No lower court has so interpreted the *Radovich* case, and decisions to the same effect as formerly continue to flow from the courts almost daily. For example, *Miller Motors v. Ford Motor Co.,* 252 F.2d 441 (4 Cir.); *Riggall v. Washington County Medical Society,* 249 F.2d 266, 268 (8 Cir.), cer. den. 355 U.S. 954 as well as other decisions of courts of appeals and numerous decisions of district courts. *Radovich* does not support petitioner. That case was decided on the allegations of the complaint alone, and the plaintiff "raised his action in the context of a general and overall destruction of competition in the football business, the injury to him being imposed as part of the plan [of one of two football conferences] to fight the All America Conference" and thereby monopolize the whole business of football. Radovich was not the target of the conspiracy; his injury was sustained as part of and incidental to a conspiracy of broader purpose falling directly within the meaning of "restraint" as explained in the *Apex* case. What this Court rejected in the *Radovich* case was the contention that a private suitor had to plead more than the government, in that he not only had to plead a violation of the Act and his own injury but something *additional.* But no violation is shown unless the kind of restraint involved has that special injury to the public of which the *Apex* case speaks.

(5) The gist of the position of the petitioner and the Solicitor General is a syllogism of two premises, that "group refusals to deal" are "group boycotts", and that "group boycotts" are illegal *per se.* Neither premise is sound.

A "boycott" is not merely a joint refusal to deal; it is a joint refusal to deal used as a means of coercing the boycotted persons to conform to the wishes of the boycotters. Taft, J. in *Toledo A.A. & N.M. Co. v. Pennsylvania Co.*, 54 Fed. 730 (C.C. N.D. Ohio); Thornton on Combinations in Restraint of Trade, p. 950. There was no such boycott here. While Hale is charged with refusing to purchase from the other respondents in order to induce them not to sell to petitioner, this action of Hale's was unilateral, not joint. The alleged concert of action was the refusal of the suppliers to sell to petitioner, but this was not done to coerce petitioner to do or refrain from doing anything.

But whether or not a joint refusal to deal is called a "boycott", it is not illegal *per se*. Like any alleged violation of the Sherman Act, its legality depends on the purpose, intent and effect. In every case where a boycott has been held illegal, it was a boycott of a whole *class* of persons, or to compel compliance with restrictive trade practices, or otherwise to affect prices, quality or availability to the public, or to work a monopoly. Our Argument analyzes each cited decision of this Court touching on the subject[10] to show that this is so. The lower courts have always so understood these cases and have rejected the contention that they mean that any joint refusal to deal is *per se* illegal; e.g., *Ruddy Brook Clothes v. British & Foreign Marine Ins. Co.*, 195 F.2d 86 (7 Cir.), cer. den. 344 U.S. 816; *Interborough News Co. v. Curtis Publishing Company*, 225 F.2d 289 (2 Cir.).

Petitioner and the Solicitor General would state the issue to be whether an injury to a "single trader" can be a violation of the Act. This is not the issue. A conspiracy injuring a single trader might, on the facts of the particular case, also involve

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10. *Binderup v. Pathe Exchange*, 263 U.S. 291; *Fashion Originators' Guild v. F.T.C.*, 312 U.S. 457; *United States v. Columbia Steel Co.*, 334 U.S. 495; *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211; *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594; *Northern Pacific R. Co. v. United States*, 356 U.S. 1.

injury to the public; for example, where the consequence was to leave but one other person in business, thus creating a monopoly, or the purpose was to remove an obstacle to a price fixing scheme. But where injury to the single trader is the only purpose and effect, the Sherman Act has never been held to apply.

(6) No genuine issue of fact was involved that precluded a summary judgment. While existence of a conspiracy is a question of fact, respondents assumed its existence for the purpose of the motion. What was left was petitioner's argument that a conspiracy to refuse to sell to a single retailer, *without more*, is *per se* illegal. That presented a pure issue of law. The facts left no genuine issue as to monopolization, and no other factual matter was material.

III. That relation to interstate commerce necessary to bring the case within the Act was not present. While the amount of commerce involved in a case may not be relevant, the effect of the restraint upon what amount is involved must be "substantial". *Mandeville Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219. Here the effect was simply nil. All the decisions have agreed that in a case like the present, where one dealer has been unable to obtain certain goods but many others do handle those goods, interstate commerce is not involved, because there is no alteration whatever in the flow of the commodity, and the channels of commerce have not been used to work any effect on the public or the market.

IV. In a very real sense the case presents the issue whether the Sherman Act is to remain consonant with "the serious purposes for which it was framed" or is to become a sort of section of some Federal Commercial Code treating of private commercial torts. The legislative history and an unbroken chain of decisions have shown that the Act was not designed to create private rights, with respect to which the States were wholly competent to legislate, but was enacted for a broad public purpose, to reach what

were regarded as grave threats to the American system. In this respect the standards of the Act are the same as for the Federal Trade Commission Act *(International Shoe Co. v. Federal Trade Commission,* 280 U.S. 291, 298), and proceedings under the latter do not lie in a controversy essentially private in its nature, *Federal Trade Commission v. Klesner,* 280 U.S. 19.

The private action under the Sherman Act was authorized as a means of enlisting private aid in reaching acts injurious to the public, as an auxiliary means to pursue public wrongs. A multitude of cases so holds, and the several unusual privileges conferred by the Act on the private litigant, such as the recovery of treble instead of actual damages, are consistent only with recognition of that fact. *Bruce's Juices v. American Can Co.,* 330 U.S. 743, 751. Whenever no more was perceived in a case than a private wrong, the plaintiff has been relegated to the common law or to state statutes.

Commercial torts often involve "restraints", if that term be granted the literal meaning *Apex Hosiery Co. v. Leader, supra,* denied it, and the additional charge of "conspiracy" is one easy to make with wide latitude in proving it. *Theater Enterprises v. Paramount Film Distributing Corporation,* 346 U.S. 537, 541. If now it should be held that "conspiracy" in a commercial tort is enough to create a Sherman Act case, the federal courts will be inundated with trivial or private disputes by the talismanic addition to every commercial quarrel of the epithet "conspiracy". In *Radovich v. National Football League, supra,* this Court rejected a contention that a private litigant must allege more (apart from his own damage) than the Government. Now petitioner and the Solicitor General ask the Court to hold that the private litigant need prove less. The decision below will not affect public suits, for the Government has heretofore always recognized that its duties and powers under the Act were not concerned with matters completely lacking public concern, like the present case. "The

understandable search by enforcement agencies for universals in the interest of simplified enforcement and the trend toward more extensive coverage of the Sherman Act should not be permitted to obscure the aims of the statute." Barber, "Refusals To Deal Under The Federal Antitrust Laws", 103 Univ. Pa. L. Rev. 847, 885.

In order to permit petitioner to proceed with his alleged grievance in a federal court, nearly fifty years of construction of the Sherman Act must be rejected.

ARGUMENT

Petitioner states the question to be whether a complaint which alleges *a violation* of the Sherman Act and consequent damage to the private plaintiff states a cause of action, if it fails to allege, as an *additional* element, a "public injury" (Br. 4). This is not the issue. *If* a plaintiff does allege facts constituting *a violation* of the Sherman Act, plus his private damage, he states a case. But the question is: what constitutes a violation of the Act?

The issue may be stated thus: Is an agreement among a retailer and two or more suppliers not to sell to a particular retailer next door in and of itself, *without more,* violative of the Sherman Act?—for here there was no more; no intent to reach anyone other than the one retailer, no intent to injure the public, and in fact no injury to any other retailer or the public, no monopolization, no effect whatever on the market. Petitioner's basic contention is that any "refusal to deal"—"pursuant to conspiracy"—"is *per se* illegal conduct even though directed at a single trader" (Pet. Br. 37; to the same effect, Sol. Gen. Br. 4).[11]

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11. The issue is not whether a conspiracy to the injury of "a single trader" can ever be a violation of the Act. It might be, as, for example, if the consequence was to leave but one other trader in the market. (See discussion at p. 63 *infra.*)

I. This case seen in perspective: The relation of two adjoining stores.

According to the complaint the moving force in the alleged conspiracy was Hale, a retailer of appliances. What the complaint charges is that Hale told each supplier-respondent that it would not patronize that supplier if it should sell to petitioner; the supplier thus had its choice of selling to Hale or selling to petitioner, and it preferred Hale's custom. This is explicitly stated in paragraph 8 of the amended complaint (R. 11, 12; quoted, p. 7, *supra.*) As petitioner's brief shows, this is its real claim. Thus it says (Br. 8):

> "It alleged that Broadway-Hale 'had used its monopolistic buying power' in dealing with the manufacturer-distributor respondents, and that it 'has purchased and continued to purchase the products of the manufacturer-distributor defendants upon the condition that the manufacturer-distributor defendants do not sell their products to the plaintiff.' "[12]

Self-evidently, if this case involved but one supplier who chose Hale over petitioner at Hale's request, there would be no violation of the Act. The case stated by the complaint is that of two retailers located next door to each other, one of whom does not care to handle a brand its neighbor handles. There are plenty of brands in existence, more than enough for both. Should one handle Brand A, his neighbor prefers to handle Brand B.

The chart opposite page 10 shows that four appliance retailers other than Hale and petitioner were in the *same block*, two on the same side of the street, none a party to the alleged conspiracy. If Hale had demanded from a supplier an *exclusive* for its product on that block no one could possibly contend that an agreement to give it such an exclusive would violate the Sherman Act. *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir.), cer. den. 355 U.S. 822; reh. den. 355 U.S. 900, 357 U.S.

12. To the same effect, Br. 32.

923; *Lawlor v. National Screen Service Corp.*, 352 U.S. 992. Yet here what Hale is alleged to have received was less than even that slight "exclusive", for its "exclusive" was only against its closest neighbor.

A buyer's refusal to buy from a supplier should the latter sell to a competitor, coupled with the supplier's preference of the former's trade, is not illegal under the Sherman Act. In *Federal Trade Commission v. Raymond Co.*, 263 U.S. 565, cited with approval in *United States v. Bausch & Lomb Co.*, 321 U.S. 707, 729, this Court said (p. 573):

> "Thus a retail dealer 'has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself.' *Eastern States Lumber Assn. v. United States*, 234 U. S. 600, 614; * * *. He may lawfully make a fixed rule of conduct not to buy from a producer or manufacturer who sells to consumers in competition with himself. *Grenada Lumber Co. v. Mississippi*, 217 U. S. 433, 440. Likewise a wholesale dealer has the right to stop dealing with a manufacturer 'for reasons sufficient to himself.' And he may do so because he thinks such manufacturer is undermining his trade by selling either to a competing wholesaler or to a retailer competing with his own customers. Such other wholesaler or retailer has the reciprocal right to stop dealing with the manufacturer. This each may do, in the exercise of free competition, leaving it to the manufacturer to determine which customer, in the exercise of his own judgment he desires to retain."[13]

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13. The Court quoted (p. 571) what the Circuit Court of Appeals had said:

> "So far as petitioner itself is concerned, it had the positive and lawful right to select any particular merchandise which it wished to purchase, and to select any person or corporation from whom it might wish to make its purchase. The petitioner had the right to do this for any reason satisfactory to it, or for no reason at all. It had a right to announce its reason without fear of subjecting itself to liability of any kind. It also had the unquestioned right to discontinue dealing with any manufacturer, * * * for any reason satisfactory to itself or for no reason at all."

In *Mackey v. Sears, Roebuck & Co.*, 237 F.2d 869 (7 Cir.), petition for certiorari dismissed, 355 U.S. 865, count one of the complaint alleged that defendant had informed plaintiff "it would discontinue its purchases [from plaintiff] unless [plaintiff] refrained from selling * * * to competitors of Sears" (p. 872, 1st col.). The court held (p. 872) that the count "did not state a claim under § 1 of the Sherman Act."[14]

Patently, an agreement between Hale and even one supplier to sell to it rather than petitioner would be *joint* action,—a "conspiracy," in the sense used by petitioner. But it would not be illegal. *Hudson Sales Corp. v. Waldrip*, 211 F.2d 268 (5 Cir.), cer. den. 348 U.S. 821. As the court below said (R. 171):

> "If 'X Company,' a manufacturer, refuses to sell to Klors, Inc., and sells to 'Y Company,' a retailer who also agrees to buy from 'X' as long as 'X' does not sell to Klors, more than one person is involved, and they have agreed not to sell, but their act is not necessarily illegal. To a minute degree, any refusal to sell is a restraint of trade, in the ordinary sense; but it is not necessarily a restraint in the Sherman Act sense."

It not being an illegal agreement for respondent Hale to say to a manufacturer of television sets, "I will not buy from you if you sell to my next door neighbor" and for the manufacturer to choose Hale, it could not become illegal for Hale to say the same thing to a manufacturer of stoves, a manufacturer of washing machines, and a manufacturer of radios, each acceding. Cf. *Interborough News Co. v. Curtis Publishing Co.*, 127 F. Supp. 286 (S.D. N.Y.), affirmed 225 F.2d 289 (2 Cir.).

Petitioner apparently adds to these facts an allegation that the several suppliers and Hale "conspired" together. If this is a mere epithet to describe a situation where each of several suppliers chose to sell Hale, it adds nothing. But assuming, as we have

14. The law of California under its antitrust statute is to the same effect. *Rolley, Inc. v. Merle Norman Cosmetics*, 129 C.A. 2d 814, 278 P.2d 63.

done,[15] that it was intended to be more than an epithet and to make the charge of an actual agreement, what element has been added which makes illegal what was otherwise legal? The only new element is that there is one agreement with more than two parties instead of several two-party agreements (Cf. *Kotteakos v. United States*, 328 U.S. 750).

But, as we now proceed to see, the legality of any conspiracy under the Sherman Act, whether the parties to it are few or many, depends on *the purpose, intent and effect* on the market or the consuming public. The broader agreement is neither more of a restraint nor more unreasonable than several, merely because there are more parties to it. In order to determine whether there is a restraint or, if so, an unreasonable one, one must inquire into the facts.

II. The charged conspiracy involves no unreasonable "restraint of trade" within the meaning of the Sherman Act.

Section 1 of the Sherman Act provides that

> "every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce"

is illegal (15 U.S.C. Sec. 1). Thus the Act does not prohibit all conspiracies but only those in restraint of trade and commerce.

The key phrase is "restraint of trade". When the statute was enacted, there were two possibilities of interpretation—to construe it literally or to construe it historically in the light of the common law, the evils the Act was designed to eliminate, and the grave purposes and objectives with which a federal government should justly

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15. Contrary to assertions of petitioner (e.g., Br. 14), the Court of Appeals made the same assumption. See quotations from its opinion at pp. 5, 15, *supra*. But we cannot avoid a reflection that it taxes credulity to suppose that a manufacturer of radios and televisions like Zenith (R. 6) conspired with a manufacturer of gas stoves like Rheem (R. 7) and a manufacturer of clothes washers and dryers like Whirpool-Seeger (R. 6), not to sell to petitioner.

concern itself. Almost from the beginning the Court made its choice: the key phrase could not be given a drily literal meaning. As Justice Brandeis later observed for the Court in *Chicago Board of Trade v. United States*, 246 U.S. 231, 238:

> "* * * the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence."

It soon became clear that *two* requirements must be met before a conspiracy working a restriction on trade becomes a violation of the Sherman Act. It must be a "restraint of trade", within the meaning of the Act, and, additionally, it must be "unreasonable". Before questions of "reasonableness" or "*per se* unreasonableness" can arise, a case must first involve the kind of restriction that the Sherman Act means by "restraint". The distinction between the problem of what is a "restraint" and what kind of "restraints" are unreasonable is recognized in *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 502, where it is said that a certain type of combination

> "was not considered an illegal restraint of trade at common law when the Sherman Act was adopted, either because it was not thought to be unreasonable or because it was not deemed a 'restraint of trade.'"

A. THE RESTRICTION ON TRADE IN THIS CASE WAS NOT A "RESTRAINT" WITHIN THE MEANING OF THE SHERMAN ACT.

Prior to 1940, the courts used various expressions to define the scope of the Act. In 1911, in *Standard Oil Co. v. United States*, 221 U.S. 1, this Court said (p. 78) that

> "the fact must not be overlooked that injury to the public by the prevention of an undue restraint on, or the monopolization of trade or commerce is the foundation upon which the prohibitions of the statute rest * * *."

In 1913, in *Nash v. United States*, 229 U.S. 373, 376 (per Holmes, J.), the Court summed up the *Standard Oil* case and the *American Tobacco* case[16] as establishing

> "that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade."

This was quoted and reaffirmed in *Eastern States Lumber Assn. v. United States*, 234 U.S. 600, 610 (1913) and again by Chief Justice Hughes in *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 360 (1933).

Then in 1915, in *Wilder Mfg. Co. v. Corn Products Co.*, 236 U.S. 165, this Court made the matter more explicit, with its converse; by stating that "the prohibitions of the statute were enacted to prevent *not the mere injury to an individual* * * * *but the harm to the general public* which would be occasioned by the evils which it was contemplated would be prevented, and hence * * * the prohibitions of the statute * * * were co-extensive with such conceptions" (p. 174). In *Mandeville Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948), the Court reaffirmed the test of a private party's right to recover under the Act to be "whether the statute's policy has been violated in a manner to produce the general consequences it forbids for the public and the special consequences for particular individuals" (p. 243).

But the key case is *Apex Hosiery Co. v. Leader*, 310 U.S. 469, decided in 1940. It was here that this Court finally gave the definitive expression of the *kind of restraint* of trade with which the Act is concerned. The Court rejected the contention that "the Sherman Act is violated when it is shown that a combination or conspiracy existed which resulted in a restraint of commerce" (pp.

16. *United States v. American Tobacco Co.*, 221 U.S. 106, partic. at 179 (1911).

473, 484), even when the defendants "intended to restrain commerce" and such was the direct consequence (pp. 475, 485). Said the Court:

> "But the Sherman Act admittedly does not condemn all combinations and conspiracies which interrupt interstate transportation. (p. 486)
>
> "* * * The prohibitions of the Sherman Act were not stated in terms of precision or of crystal clarity and the Act itself did not define them. In consequence of the vagueness of its language, perhaps not uncalculated, the courts have been left to give content to the statute, and in the performance of that function it is appropriate that courts should interpret its word in the light of its legislative history and of the particular evils at which the legislation was aimed. * * * (p. 489)
>
> "* * * the precise question which we are called upon to decide is whether that restraint * * *is the kind of 'restraint of trade or commerce' which the Act condemns. (p. 490)
>
> "* * * the mere fact of * * * restrictions on competition does not in itself bring the parties to the agreement within the condemnation of the Sherman Act. (p. 503)
>
> "* * * the conspiracy or combination must be aimed or directed at the kind of restraint which the Act prohibits or that such restraint is the natural and probable consequences of the conspiracy. (p. 511)
>
> "The Sherman Act is concerned with the character of the prohibited restraints and with their effect on interstate commerce. (p. 513)
>
> "* * * the phrase 'restraint of trade' * * * was made the means of defining the activities prohibited." (pp. 494, 495)

Having thus made clear that not all restrictions on competition are "restraints" within the purview of the Act, the Court spelled out the tests by which to determine what were the forbidden "restraints".

"The end sought was the prevention of restraints to free competition in business and commercial transactions *which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services*, all of which had come to be regarded as a special form of public injury." (p. 493)

And, as stated again, the Act aimed at the kind of restraints deemed illegal at common law,

"* * * the restriction or suppression of competition in the market, agreements to fix prices, divide marketing territories, apportion customers, restrict production and the like practices, *which tend to raise prices or otherwise take from buyers or consumers the advantages which accrue to them from free competition in the market.*" (p. 497)

"* * * this Court has not departed from the conception of the Sherman Act as affording a remedy, public and private, *for the public wrongs which flow from restraints* of trade in the common law sense of restriction or suppression of commercial competition. In the cases considered by this Court since * * * 1911 * * * in general restraints upon competition have been condemned only *when their purpose or effect was to raise or fix the market price.* It is in this sense that it is said that *the restraints*, actual or intended, prohibited by the Sherman Act are only those which are *so substantial as to affect market prices.* Restraint on competition or on the course of trade in the merchandising of articles moving in interstate commerce is not enough, unless the restraint is shown to have or is intended to have *an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition.*" (pp. 500, 501)

In short, to be a "restraint", a restriction must affect the market *to the detriment of the public as purchasers* of goods or services. If it does not do that, if it does not meet these tests, it is not a "restraint of trade".

The Apex doctrine is not confined to labor matters.

Contrary to petitioner's statement (Br. p. 17) *Apex Hosiery Co. v. Leader, supra*, was not decided on any ground peculiar to labor or labor organizations. The Court took pains to make that clear. It said (p. 512):

> "Apart from the Clayton Act it [the Sherman Act] makes no distinction between labor and non-labor cases. We * * * hold * * * both in labor and non-labor cases, that such restraints are not within the Sherman Act unless they are intended to have, or in fact have, the effects on the market * * *. Unless the principle of these cases is now to be discarded, an impartial application of the Sherman Act to the activities of industry and labor alike would seem to require that the Act be held inapplicable * * *."

No "restraint of trade" here.

In the present case there was, we submit, no "restraint of trade" at all, although there may have been a restriction; there were none of "the general consequences [the Act] forbids for the public" (*Mandeville, supra*), no "public injury", no consequence or effects on the market or to the consumer (*Apex, supra*)—and none intended.

But, even if it be assumed that the restriction rose to the dignity of a "restraint", it was not, for that reason illegal.

B. IF THERE WAS A "RESTRAINT OF TRADE", IT WAS NOT UNREASONABLE.

In meeting the first and early question whether the Sherman Act was to be given a literal meaning, this Court soon came to its enunciation of its Rule of Reason, that the Sherman Act applies only to "acts which were unreasonably restrictive of competitive conditions". *Standard Oil v. United States*, 221 U.S. 1, 58 (1911). In *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 387, the Court said:

> "It was judicially declared a proper interpretation of the Sherman Act in 1911, with a strong, clear-cut dissent chal-

lenging its soundness on the ground that the specific words of the Act covered every contract that tended to restrain or monopolize. This Court has not receded from its position on the Rule. There is not, we think, any inconsistency between it and the development of the judicial theory that agreements as to maintenance of prices or division of territory are in themselves a violation of the Sherman Act. It is logical that some agreements and practices are invalid *per se*, while others are illegal only as applied to particular situations."

At the last term, in *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5, it said:

"Although this prohibition is literally all encompassing, the courts have construed it as precluding only those contracts or combinations which 'unreasonably' restrain competition."

Even if we assume, then, that the alleged restriction in the instant case was a "restraint of trade", the next question is whether it was "unreasonable".

Unless it should be held that *factual inquiry into reasonableness* was precluded by an obdurate rule of law, the conclusion of both courts below that there was no effect on the market stands as a factual conclusion and disposes of the case.[17] Thus the question becomes simply this: In the case shown by the record, is the agreement unreasonable *per se?* Unless the answer to this question is in the negative, it would be difficult to conceive of any agreement working a restriction, outside of the field of labor, that would not be violative of the Sherman Act, *per se*.

In *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5, the Court said that:

"there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the pre-

17. See footnote 1 on p. 4, *supra*.

> cise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken."

The Court then listed the "practices which have heretofore been deemed to be unlawful in and of themselves". These we consider at page 59 *infra*. This alleged conspiracy in the present case was not of any of the types so delineated. And no elaborate economic inquiry was required. The record facts, even assuming an agreement, are all admitted. We submit that they do not constitute a *per se* violation.

The petitioner and the Solicitor General seek to extend the boundaries of *per se* violations. The latter's memorandum filed in support of the petition for certiorari in September 1958 argued (p. 5) that "[i]f petitioner's store had been the object of a price-fixing conspiracy or a tying arrangement, the restraint would be deemed *per se* unlawful", and therefore the alleged conspiracy should also be held illegal *per se*. This is merely an attempt to extend the *per se* rule, by analogy, until finally a jurisprudence of inflexible *per se* violation will supplant the flexible approach which this Court has established.[18] It ignores Chief Justice Hughes' statement in *Appalachian Coals, Inc. v. United States*, 288 U.S.

18. In his memorandum of September 1958, the Solicitor General asserted (pp. 3, 4) that "The court below has rejected [the] flexible approach" approved by this Court. But this approach is exactly the approach taken by the Court of Appeals. The assertion does not appear in the Solicitor General's brief filed after granting of the writ. It is the Solicitor General who asks the Court to reject the flexible approach in favor of an extension of *per se* rules.

344, 360, and *Sugar Institute v. United States*, 297 U.S. 553, 597, that "The restrictions the Act imposes are not mechanical or artificial."

The situation in this case was summarized by the Court of Appeals (R. 180):

> "The facts prove no more than a squabble between two of many competitors in a highly competitive market area. The facts prove no conduct in violation of the antitrust laws because there has been no conduct by which the 'public' could conceivably suffer injury."

And we note again the passage from the opinion (R. 178-9), quoted at p. 15, *supra*, where the court pointed to the fact that the complaint alleges that only the *plaintiff* (italics are the court's) was prevented from obtaining some of the many available brands of products, that there was no claim of "actual, attempted, or intended control of the market", that the facts "leave no doubt that the conduct directed at this particular plaintiff and only at this plaintiff did not and could not have under the circumstances any substantial effect on market competition", and that Hale neither intended nor had the power "to effect such conditions on its purchases in such scope as to appreciably affect competition among retailers generally in their purchases or sales to the public".

A learned commentator has described the decision below in these words:

> "Let me restate my understanding of Judge Barnes' thesis: those restraints which have traditionally been regarded as unlawful *per se* have been so classified because of their inherent capacity to injure the public. Typical are those mentioned by Mr. Justice Stone in *Apex Hosiery*: agreements to fix prices, divide marketing territories, apportion customers, restrict production and the like. But apart from these classic instances of intrinsically anti-competitive practices, public injury—that is, a substantial interference with

competition in the relevant market—must be demonstrated as a matter of fact. This is just another way of saying that the rule of reason comes into play whenever the restraint falls outside the *per se* category. Unless the public is likely to be injured through a deprivation of the fruits of a competitive order, the restraint is not unreasonable."[19]

C. THERE ARE MANY CASES INVOLVING SIMILAR FACTS, AND THEY HAVE CONSISTENTLY HELD THAT THERE IS NO VIOLATION OF THE ACT.

The kind of case petitioner presents has appeared frequently in the books. Without exception every court has held that no cause of action exists under the Sherman Act. It has been held, repeatedly, that the Act is not concerned with whether a particular retailer, sales agent or consignee, handles or sells a particular brand of commodity so long as there are many others selling it, there being no effect, and no purpose to work an effect, on prices, quality or quantity available to the public and no monopoly. Conversely, in every case where the Sherman Act has been held violated the conspiracy was aimed at or struck a broader purpose or target than a particular plaintiff in a highly competitive market—for example, its purpose was to fix prices and the particular plaintiff was injured as an incident to the accomplishment of that purpose.

Chronologically, early and oft-cited cases are *Abouaf v. J. D. & A. B. Spreckels Co.*: 26 F. Supp. 830, 832 (N.D. Cal. 1939), a suit against 24 defendants, and *Arthur v. Kraft-Phenix Cheese Corp.*, 26 F. Supp. 824 (D. Md. 1938), both of which preceded *Apex Hosiery Co. v. Leader*, 310 U.S. 469.

Directly in point are *Shotkin v. General Electric Co.*, 171 F.2d 236 (10 Cir.), and *Feddersen Motors v. Ward*, 180 F.2d 519 (10 Cir.), leading cases. In the *Shotkin* case, a dealer charged some 80 defendants with a conspiracy to restrain and monopolize trade

19. Milton Handler, "Recent Antitrust Developments", The Record of the Association of the Bar of the City of New York, October 1958, 426, 430.

by refusing to sell him electric appliances. Affirming dismissal on motion, the court said (p. 239):

> "Injury to plaintiff, of itself and alone, is not sufficient to warrant a civil action of this nature. * * * There must be harm to the general public in the form of undue restriction of trade and commerce as the result of wrongful contract, combination or concert.
>
> * * * * * * *
>
> "During all of the time referred to in the amended complaint, the defendant General Electric Company and its related companies, the defendant Westinghouse Electric & Manufacturing Company and its related companies, and the defendant Thomas A. Edison, Inc. and its related companies sold their products in all parts of the United States through dealers in virtually every city, town and village; and the inability of plaintiff to sell the products of all or any of them in interstate commerce as a part of his business in Denver would in the very nature of things have infinitesimally little effect upon such commerce."

In the *Feddersen* case an automobile dealer charged a conspiracy between the manufacturer and one of its dealers not to sell to him. Affirming a dismissal on motion, the court said that the complaint (p. 522):

> "alleged that the defendants formed a combination or conspiracy in restraint of interstate commerce * * * to force plaintiff out of business as a dealer in Hudson automobiles. * * * that defendants had discriminated against plaintiff in certain respects. * * * that the effect * * * was to burden, obstruct, and unduly restrain interstate commerce and trade in new Hudson automobiles. But these were general allegations in the nature of conclusions, without any averment of specific acts from which it could be determined as a matter of law that defendant violated the act with harmful results to the public. * * * [or] that the contemplated purpose, tendency, inherent nature, or result of the conspiracy was that fewer automobiles moved in interstate commerce from De-

troit, Michigan, into Colorado, or other destination, or that less Hudson automobiles were available for purchase in the markets, either in Colorado or elsewhere; or that the quality of the Hudson cars was lowered in any manner. * * * [or] that the contemplated purpose, tendency, inherent nature, or result of the combination was to bring about any diminution in quantity or deterioration in quality of new Hudson automobiles moving in interstate commerce and sold to the public. Facts were alleged which tended to show that the conspiracy as contemplated and effectuated harmed plaintiff. But that was not enough. In addition, it was essential that the pleading allege facts from which it could be determined as a matter of law that the conspiracy contemplated or tended to restrain interstate commerce, with harmful effect to the public interest."[20]

The *Shotkin* and *Feddersen* cases, unless erroneous, call for affirmance of the judgment here. Petitioner so conceded below

20. Petitioner (Br. 23) cites *New Home Appliance Center v. Thompson*, 250 F.2d 881 (10 Cir.) as a rejection of the *Shotkin* and *Feddersen* cases. This is not so. The *New Home Appliance* case was decided purely as a question of pleading, not on a motion for summary judgment, the court noting (p. 883) that "the free use of summary judgment is available to avoid exepensive trials of frivolous claims". The issue was simply the sufficiency of a complaint which alleged a conspiracy aimed not at the plaintiff alone but one aimed at the whole class of retail dealers, to fix prices, and to monopolize. The

> "purpose, object and effect [was] to deny retail appliance *dealers* in Denver, Colorado free access to the channels of interstate commerce by preventing them from making interstate purchases; and requiring them to purchase their requirements of home appliances from local wholesalers in Colorado, and thus *to fix the prices* at which such products were to be sold retail by Denver retail dealers; *to monopolize* interstate commerce in wholesale appliances and to eliminate the complainant as a competitor in such trade." (p. 882)
>
> * * * * * * *
>
> "It was specifically alleged that by such concerted action, the defendants had restrained and monopolized a substantial part of interstate commerce by eliminating the plaintiff's competition and raising prices for home appliances to consumers in Denver and vicinity." (p. 883)

These elements were lacking in the present case.

(R. 174, 175), but argued that these cases were repudiated in *Radovich v. National Football League*, 352 U.S. 445, an argument we examine at pp. 42-49, *infra*.

In *Hudson Sales Corp. v. Waldrip*, 211 F.2d 268 (5 Cir.), cert. den. 348 U.S. 821, a dealer sued the manufacturer and another dealer for conspiring to terminate his sales representation. The court noted that

> "It was established, indeed admitted, that when plaintiff gave up the Philco Agency, whether he gave it up as he claims under compulsion or as defendant claims of his own volition, another person took the agency over immediately and there is no proof whatever that his giving up Philco affected either competition or price, or that there were fewer Philcos sold, as a result of the change, than had been sold by plaintiff." (p. 273)

The court referred to the

> "many cases dealing with suits of this general nature which have firmly established the principle that an essential to a private recovery is a showing of a public injury, and that only unreasonable restraints of interstate commerce, restraints which substantially affect competition or which have the purpose or effect of raising or fixing market prices, are condemned under Section 1 of the Sherman Act * * *." (pp. 270, 271)

Many decisions were summed up in *Miller Motors v. Ford Motor Co.*, 252 F.2d 441 (4 Cir.)[21] affirming 149 F. Supp. 790 (M.D. N.C. 1957), and many similar District Court decisions may be cited. For example, in *Neumann v. Bastian-Blessing Co.*, 70 F. Supp. 447, 479 (N.D. Ill.) the court referred to the plaintiff's "fallacious assumption that his medium of sale and distri-

21. The opinion in that case was by Judge Sobeloff. We think it worthy of comment that Judge Barnes, formerly Chief of the Antitrust Division and the author of the opinion in the instant case, and Judge Sobeloff, formerly Solicitor-General, are in accord on the governing principles of law.

bution is the sole and only effective means of marketing competitors' products * * * and that his removal necessarily results in a monopoly." It said:

> "No facts are alleged from which the court can construe the effect of such alleged conspiracy to result in an injury to the public *since it is not stated that the public has been deprived of the continued sale and distribution of such equipment or suffered any other injury from the defendant's alleged wrongful acts*, or that there was such a restraint on competition as to violate the Act."[21a]

In *Admiral Theatre Corp. v. Paramount Film Dist. Corp., et al.* 140 F. Supp. 686 (D. Neb.), the court, assuming "the existence of a combination and conspiracy among the defendants, having as its object a refusal to negotiate as above stated" (p. 689), granted a summary judgment of dismissal, saying:

> "* * * the question * * * boils down to this: whether the arrangement or combination of which plaintiff complains, is one which can be said to be in restraint of trade, i.e. injurious in any perceptible degree to the movie-going public in Omaha, Nebraska, or to any considerable portion of it, in tendency or effect, and whether the object of such conspiracy violated any legal right of the plaintiff protected by the Sherman Act.
>
> * * *
>
> "Assuming that plaintiff was denied the right to 'negotiate' for exclusive second run, with reasonable clearance, as a consequence of the instant conspiracy, who can gainsay that the movie-going public in Omaha, Nebraska, where the impact of the conspiracy is placed and the area of competition is fixed, was not injured thereby." (pp. 696-7).

21a. In *Riedley v. Hudson Motor Car Co.*, 82 F. Supp. 8 (W.D. Ky.), the court noted the absence of any claim

> "that the termination of his dealership contract will affect the public in the ability to purchase Hudson automobiles and accessories. No claim is made that the elimination of plaintiff as a dealer will result in lessening the supply of Hudson automobiles, parts and accessories through their dealerships or to the market generally." (p. 10)

Many other cases decided after *Apex Hosiery Co. v. Leader, supra*, can be cited to the same effect; e.g., *Ruddy Brook Clothes v. British & Foreign Marine Ins. Co.*, 195 F.2d 86 (7 Cir.), cer. den. 344 U.S. 816; *Kinnear Weed Corp. v. Humble Oil & Refining Co.*, 214 F.2d 891 (5 Cir.), cer. den. 348 U.S. 912; *District of Columbia Citizen Pub. Co. v. Merchants & Manufacturers Ass'n.*, 83 F. Supp. 994 (D.D.C.); *Swartz v. Forward Ass'n.*, 41 F. Supp. 294 (D. Mass.); *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir.), cer. den. 355 U.S. 822; reh. den. 355 U.S. 900, 357 U.S. 923.

Comparison of petitioner's case with the foregoing decisions.

Petitioner's case is weaker than that of plaintiff in any of the decisions cited above, for two reasons:

1. Virtually all those cases were decided on demurrer or motion to dismiss, i.e., taking the allegations of the complaint at utmost value. The instant case was decided with the benefit of uncontradicted factual clarification on motion for summary judgment.

2. In many of the decisions, as in the automobile dealership cases or the *Kraft-Phenix Cheese* case, the result of the "conspiracy" was to create a *sole* dealership in a given area of a particular brand. Yet it was held that the competition with other brands negatived a monopoly. This accords with the decision in *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377 (the *Cellophane* case) that competition must be judged in the light of all products competing for the same consumer's dollar.[22] It said (p. 393):

> "* * * this power that, let us say, automobile or soft-drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly. Illegal power

22. While the Court divided in that case on the issue whether cellophane was in competition with other types of packaging materials, there was no disagreement on the principle.

> must be appraised in terms of the competitive market for the product."

So also in *Northern Pacific R. Co. v. United States*, 356 U.S. 1 at 7, this Court observed that

> "if one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself."

In the present case, not only were there countless competing brands widely handled, but the same brands are being sold by hundreds of other retailers in San Francisco.

D. "PUBLIC INJURY" AND THE RADOVICH CASE.

As a result of this Court's decisions discussed at pp. 28, 29, *supra*, such as the *Corn Products* case, one of the expressions which emerged in the cases and is repeated almost daily as new decisions are rendered is that there must be a *"public injury"* in order for there to be a violation of the Sherman Act, and that the Act cannot be invoked in aid of a merely private controversy. This was but a compendious mode of expressing the principle stated more elaborately in *Apex Hosiery Co. v. Leader*, *supra*, that to constitute a "restraint of trade" a restriction on trade must have certain effects on the market. Or it may be a cryptic mode of expressing the principle that restraints must be unreasonable. But it is a convenient and compact way of saying that one may not sue under the Sherman Act for damages flowing from a conspiracy unless there has been *a violation of the Sherman Act* and that not all conspiracies violate that Act because not all restrictions on trade are restraints of trade or otherwise fall under its purview.

Virtually all of the decisions cited at pp. 36 to 41, *supra* hold this requirement of "public injury" to be elementary.[23] Many other

23. *Glenn Coal Co. v. Dickinson*, 72 F.2d 885 (4 Cir.) contains a review of the authorities prior to 1930.

decisions rendered prior to *Radovich v. National Football League*, 352 U.S. 445, did the same.[24] And in the District Court petitioner conceded that a public injury was necessary.[25]

But petitioner now claims that this Court swept this settled requirement out of the law in *Radovich v. National Football League*, 352 U.S. 445, and worked an "invalidation of the doctrine of 'public injury' " (Br 28).

No lower court has shared petitioner's view of what *Radovich* held, for the decisions stating and applying the requirement of a public injury have continued to flow from the courts. Thus in *Miller Motors v. Ford Motor Co.*, 252 F.2d 441 (4 Cir.), Judge Sobeloff said (pp. 447, 448):

> "Therefore, there being no showing of any public injury resulting from a restraint of commerce in automobiles or advertising, it cannot be said that the Sherman Act has been violated. * * *
>
> "* * * The hybrid nature of a private antitrust suit dictates that, to succeed, the plaintiff must prove not only that

24. E.g.: *Kotteck v. Jewish Press*, 288 Fed. 179, 182 (8 Cir. 1923); *Brosious v. Pepsi-Cola Co.*, 155 F.2d 99, 104 (3 Cir. 1946); *Interborough News Co. v. Curtis Publishing Co.*, 225 F.2d 289 (2 Cir. 1955), aff'g 127 F. Supp. 286 (S.D.N.Y. 1954); *Schuing Motor Co. v. Hudson Sales Corp.*, 138 F. Supp. 899, 903 (D. Md. 1956), aff'd 239 F.2d 176 (4 Cir. 1956), cer. den. 355 U.S. 823 (1957); *Northern California Monument Dealers' Ass'n v. Interment Ass'n*, 120 F. Supp. 93, 95 (N.D. Cal. 1954); *Brenner v. The Texas Company*, 140 F. Supp. 240, 243 (N.D. Cal. 1956).

25. "The Court: Well, all that I was endeavoring to do, Mr. Goldstein, was to get the question down to a somewhat simple basis. The private right in antitrust arises out of the private damage because of the public wrong.

Mr. Goldstein: Yes, sir.

The Court: In other words, it doesn't arise out of a private wrong; it arises out of a public wrong.

Mr. Goldstein: There must be, as I have conceded, there must be some public interest.

The Court: And the private individual where there is a public wrong has only a cause of action when he can show that the public wrong caused him some damage.

Mr. Goldstein: Yes, sir." (R. 145-146)

the defendant has infringed one or more of the antitrust laws to the public injury, but also that such infringement has resulted in private injury to the plaintiff in its business or property."

In *Riggall v. Washington County Medical Society*, 249 F.2d 266, 268 (8 Cir.), cer. den. 355 U.S. 954, it was said:

> "* * * the complaint is confined to plaintiff's private medical practice. It charges no economic burden on the public by reason of the alleged acts of the defendants. There is no charge that the rejection of plaintiff's application for membership in the Washington County Medical Society resulted in the raising or fixing of fees charged the public by other physicians. There is no allegation in the complaint remotely suggesting that the acts of defendants cast any burden upon interstate commerce. * * * Plaintiff has not been prevented from practicing his profession, but, in the final analysis his complaint is that he could practice it more profitably but for the acts of the defendants. The Sherman Anti-Trust Act was not primarily to protect the individual but to protect the general public economically, and a private party may not recover under the act unless there has been an injury to the general public economically."

Other recent decisions of courts of appeals are *Rogers v. Douglas Tobacco Board of Trade*, 244 F.2d 471, 483 (5 Cir. 1957), and *Miller v. Town of Suffield*, 249 F.2d 16, 17 (2 Cir. 1957) cer. den. 356 U.S. 978.

Decisions of the District Court to the same effect since *Radovich* are numerous. In *Nelligan v. Ford Motor Co.*, 161 F. Supp. 738, it was said (p. 745):

> "Firmly ingrained in anti-trust law is that before a plaintiff may recover in a treble damage suit, he must show public injury."

In *Sandidge v. Rogers*, 1958 Trade Cases, Para. 69,191 (S.D. Ind. Oct. 15, 1958), granting summary judgment, the court said:

> "The facts in these proceedings disclose that the plaintiff has been damaged in her business and her property but the

facts in no respect affect either the consuming public, or competition in the relevant market nor does it tend to do so."

Still other decisions are *Radiant Burners, Inc. v. American Gas Assn.* 1958 Trade Cases, Para. 69,173 (N.D. Ill. Oct. 8, 1958), *Sperry Rand Corporation v. Nassau Research and Development Associates*, 152 F. Supp. 91, 95 (E.D. N.Y. 1957) and *Delaune v. Hibernia National Bank of New Orleans*, 1958 Trade Cases Para. 69,123 (E.D. La. 1958).

We turn to the *Radovich* case itself. The prime question there was whether football, like baseball, is immune from the Sherman Act.[26] That question does not concern us. As petitioner states (Br. 20) the *Radovich* petition for certiorari presented a second question, viz.—

> "Whether a complaint for injuries by a private party under Section 4 of the Clayton Act is sufficient *if it states violations of the anti-trust laws* and injury thereby?"

But the patent answer to a question such as that is "yes": *if* a complaint *states a violation of the antitrust laws* with injury therefrom, it is sufficient. The question starts on the basis that the kind of *restraint* there charged *was* a violation; that is, that it would have sustained a suit by the government. And respondents there conceded this to be true, once it was assumed that football came within the Act. But they contended that *in addition* to alleging facts showing a violation of the Sherman Act, a complaint by a private party had to allege something more about public injury.[27]

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26. The Court said (352 U.S. at 447):

> "We granted certiorari, 352 U.S. 818, in order to clarify the application of the *Toolson* doctrine and determine whether the business of football comes within the scope of the Sherman Act."

27. Petitioner's brief here (p. 21) correctly quotes from respondents' brief in the *Radovich* case, thus:

> "Hence, to state a claim for relief, a complaint must allege facts which would establish that the violations of the Sherman Act by which plaintiff allegedly has been damaged, are of such nature that the public itself has sustained a substantial injury."

This was an attempt to go beyond the teaching of *Apex Hosiery Co. v. Leader, supra.*

We need but compare the facts of the *Radovich* case with the present to see how widely different they are. In the first place, the complaint in the *Radovich* case was dismissed on a motion directed to the pleading alone. Consequently, the sole test of the sufficiency of plaintiff's case was the allegations of his complaint.[28] In the present case dismissal was upon motion for summary judgment, in which undisputed facts were adduced to control and clarify the pleading.

In the *Radovich* case, this Court said (352 U.S. 445, 448):

> "Since the complaint was dismissed its allegations must be taken by us as true. It is, therefore, important for us to consider what Radovich alleged."

What the *Radovich* complaint alleged, according to this Court's opinion (pp. 448, 449), is that the blacklist which there injured the plaintiff

> "was the result of a conspiracy among the respondents to *monopolize commerce* in professional football among the States. The purpose of the conspiracy was to 'control, regulate and dictate the terms upon which organized professional football shall be played *throughout the United States*' * * * *It was part of the conspiracy to boycott the All-America Conference and its players with a view to its destruction and thus strengthen the monopolistic position of the National Football League.*
>
> * * *
>
> "* * * Each team uses a standard player contract which prohibits a player from signing with another club without the consent of the club holding the player's contract. These contracts are enforced by agreement of the clubs to blacklist *any* player violating them and to visit severe penalties on recalcitrant member clubs."

28. Petitioner argues (Br. 23) that the *Radovich* case was dismissed after answers had been filed. But since it was disposed of on motion to dismiss, only the complaint could be considered.

Thus the *Radovich* conspiracy was not aimed at the lone plaintiff. He was incidental. It was a conspiracy to monopolize a whole industry, to boycott a whole conference and all its players, so as to destroy the competition of the entire conference and thereby to produce a monopoly of all professional football in a single conference. Confronted with these wide allegations, the Court said (p. 453):

> "While the complaint might have been more precise in its allegations concerning the purpose and effect of the conspiracy, we are not prepared to say that nothing can be extracted from this bill that falls under the act of Congress * * *."

Petitioner refers to the briefs in the *Radovich* case.[29] They are indeed revealing. Radovich's opening brief in this Court stated (p. 9):

> "In issue here is whether the complaint alleges conduct exempt from the antitrust laws and whether the complaint should set forth matters which show an adverse effect on the public *other than that pleaded*."

Thus the issue presented was whether the allegations of the particular complaint showed a sufficient adverse effect on the public. Radovich's brief further stated (p. 11):

> "Petitioner's complaint is readily within the antitrust laws. Under his allegations of respondents' attempted domination and control of football, ruination of the All America Conference, and elimination of competition, *petitioner has raised his action in the context of a general and overall destruction of competition in the football business*."

His reply brief gave the same explanation of his complaint. It stated (p. 8):

> "Petitioner has alleged that he was injured as part of a plan to monopolize the business of football by exclusion of the All-America Conference, by the elimination of competition

29 Briefs in No. 94, U.S. Supreme Court, October Term, 1956.

between the two sets of defendants and by the elimination of competition between the constituent members of each league."

Again (p. 9):

"Injury to petitioner was clearly imposed *as part of the plan to fight the All America Conference* * * *

"This action unmistakenly [sic] concerns a period of time when the respondents were engaged in the monopolization of the business of football and a 'trade war' against the All America Conference."

In short, the case was one of injury sustained by a particular plaintiff as part of and incidental to a conspiracy of broader purpose falling directly within the meaning of "restraint" as explained in *Apex Hosiery Co. v. Leader, supra,* and is poles apart from the instant case.

This Court's opinion in *Radovich* showed no purpose to depart from the teachings of *Apex Hosiery Co. v. Leader.* It reasserted them and simply held that the complaint in that case met those tests. In holding the complaint to be sufficient, it said in footnote 10 (p. 453):

"In *Apex Hosiery Co. v. Leader,* 310 U. S. 469 (1940) this Court said: 'The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, *all of which had come to be regarded as a special form of public injury.*'" (Emphasis is the Court's.)

Other than the element of injury to himself, the private litigant need prove no more than would the government in a public prosecution. But "public injury" is still a *sine qua non* of the element of violation. As stated by the Court of Appeals in its opinion here (R. 173-174):

"However, the private right is not a remedy for a private wrong created by federal law. The private right is a method

of enforcing public rights and thereby providing additional means of enforcing the prohibitions of the statute. * * * Before there can be any 'forbidden practices' there must be an improper restraint of trade or commerce; once this is established or reasonably put in issue, the private right and the consequent private protection arise. Without the prohibited restraint, there is no private right for there has been no violation, *i.e.*, there has been no conduct of defendants, which is or conceivably could be injurious to the public welfare. * * * [plaintiff] need not allege, additionally, that the public has been injured by defendants' conduct. But to have the prohibited restraint there must be facts from which it can be determined that the 'conduct charged * * * was reasonably calculated to prejudice the public interest by unduly restricting the free flow of commerce.' (*Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 5 Cir., 1954, 214 F.2d 891.)"

Pleading not involved.

The present case is not concerned with *modes of pleading*. A complaint need not use the words "public injury", for the law is not concerned with formalisms or formulae. It is enough if it charges a *kind* of restriction on trade that has an injurious effect on the public. Some kinds of restrictions, like price-fixing, of their very nature are regarded by the law as having that kind of effect. But unless the restriction involved is of *that* kind, proof addressed to the consequence on the public in the market is material.

E. AN ALLEGED CONSPIRACY DOES NOT BECOME ILLEGAL BY LABELING IT A "BOYCOTT".

Both petitioner (Br. 29, 37, 38) and the Solicitor General (Br. 4, 10) argue that a "group refusal to deal" is, without more, a violation of the Sherman Act *per se*. This they do by a supposed syllogism. As the first premise they call a joint refusal a "boycott"; as a second premise they say that a "group boycott" is illegal *per se*. This is mechanical law, and there is neither substance to it nor authority to support it.

As remarked by a District Judge of large experience in antitrust matters, Judge Yankwich, in *Encore Stores, Inc. v. May Department Stores Co.*, 164 F. Supp. 82, 85 (July 7, 1958, S.D. Cal.):

> "Calling the action of the defendants and their alleged co-conspirators a 'boycott' of the plaintiff no more settles the problem than the similar attempt of the Government in United States v. 20th Century-Fox Film Corporation, supra, to call the refusal of the motion picture companies to sell films for television 'a boycott'."

As the Court of Appeals here said, after analyzing the cases (R. 176):

> "Plaintiff cites us many cases involving group boycotts, discrimination, and the use of large scale buying power to drive out a competitor. And he supplies us with many quotations which at first blush appear to support his position. But each of his authorities involves factual situations entirely different from the one before us; factual situations in which the random phrases picked by plaintiff are proper and not inaccurate; they do not, however, support the contentions made here."

Once again, the basic fact of the present case is to be reiterated. This case concerns but one store out of hundreds; the alleged conspiracy was not aimed at a class but at petitioner, alone, and had no other consequence. It was part of no broader restrictive scheme or purpose. In *Ruddy Brook Clothes v. British & Foreign Marine Ins. Co.*, 195 F.2d 86 (7 Cir.), cer. den. 344 U.S. 816, the court, rejecting the argument (p. 88) that "a combined refusal to deal constitutes under all circumstances a prohibited restraint, that public injury inevitably follows and that the amount of commerce is immaterial", said (p. 90):

> "The effect upon competition, like that upon the flow of commerce, was 'de minimis;' it could have had no 'appreciable' effect upon either. The restraint asserted was as impotent in its relation to either commerce or competition as a lighted match to the temperature of all outdoors."

The opinion of the District Court in the *Ruddy Brook* case had said, 103 F. Supp. 290, 291 (N.D. Ill.):

> "It is clear from the allegations of the complaint that plaintiff is concerned only with a single, isolated incident involving plaintiff and defendants, and has completely failed to sufficiently plead that the public has been, or may be, affected in any way by defendants' alleged conduct. * * * In other words, the net effect of the entire complaint is that the defendants have succeeded in boycotting a single business concern and have eliminated competition among themselves only insofar as it relates to the sale of fire insurance to that one business concern."

The contention that every joint refusal to sell is (1) a group boycott and (2) that every group boycott is a *per se* violation of the Sherman Act is unsound in both its premises.

1. A boycott is a joint refusal to deal with one in order to coerce him to desired conduct: There was no such refusal here.

While the word "boycott" has sometimes been used loosely to described a group refusal to deal with another, its true meaning is that of group refusal to deal with one or more as a means of coercing them to follow the wishes of the group, as, for example, to compel those coerced to join a price-fixing scheme or to prevent them from dealing with third persons.[30] Judge Taft, in *Toledo,*

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30. Thornton "Combinations in Restraint of Trade" (W. H. Anderson Co., 1928) p. 950:

> "§ 606b. *Boycott Defined.*—A boycott has been defined as a combination of many to cause a loss to one person by coercing others, against their will, to withdraw from him their beneficial business intercourse, through threats unless others do so, the many will cause similar loss to them. It has also been defined as a combination of several persons to cause a loss to third persons by causing others, against their will, to withdraw from him their beneficial business intercourse, through threats that, unless a compliance with their demands be made, the persons forming the combination will cause loss or injury to them; or an organization formed to exclude a person from business relations with others by persuasion, intimidation and other acts, which tend to violence, and thereby cause

A.A. & N.M. Ry. Co. v. Pennsylvania Co., 54 Fed. 730, 738 (C.C. N.D. Ohio) said that this is the meaning:

> "* * * As usually understood, a boycott is a combination of many to cause a loss to one person by coercing others, against their will, to withdraw from him their beneficial business intercourse, through threats that, unless those others do so, the many will cause similar loss to them."

In the cases in which a group refusal has been held illegal as violating the Sherman Act, the term "boycott" was used in Judge Taft's sense; that is, a joint refusal to deal with persons in order to coerce them into conforming to the wishes of the boycotters.

There was no "boycott" here. Respondent Hale allegedly refused to deal with the supplier-respondents in order to compel them to conform to Hale's wishes, but Hale's refusal to deal with the suppliers was entirely unilateral; it was not in concert with anyone. The alleged concerted action consisted of the refusal of the suppliers to sell to petitioner, but this refusal was not to coerce petitioner to do or refrain from doing anything; it was simply a refusal to deal. Had respondents refused to deal with petitioner so long as he failed to conform to one or another mar-

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him, through fear of resulting injury, to submit to dictation in the management of his affairs."

Bouvier's Law Dictionary:

> "A confederation, generally secret, of many persons, whose intent is to injure another by preventing any and all persons from doing business with him through fear of incurring the displeasure, persecution, and vengeance of the conspirators."

Anderson's Law Dictionary:

> "A combination between persons to suspend or discontinue dealings or patronage with another person or persons because of refusal to comply with a request made of him or them. The purpose is to constrain acquiescence or to force submission on the part of the individual who, by noncompliance with the demand, has rendered himself obnoxious to the immediate parties, and, perhaps, to their personal and fraternal associates."

A boycott may be legal or illegal under non-federal and common law principles of tort law depending on the facts and not the label, and the cases referring to boycotts must be read with this in mind.

keting practice they desired, this might be called a boycott; but that is not this case.[31]

2. It is not the joint refusal to deal that constitutes illegality but its purpose or effect.

But assuming that *any* refusal to deal is a "boycott", the contention that it is always illegal *per se* lacks merit.

To be a violation of the Sherman Act, any joint refusal to deal must meet the test of *Apex Hosiery Co. v. Leader, supra.* If it is accompanied by the added factor of a purpose to coerce the boycotted parties to conform to the will of the boycotters, i.e., if it is a boycott in the Taft sense, the added factor may tend to supply the element of public injury required by the *Apex* case. Again, if the boycott is of a whole *class* of people, this element may be present. But if the "boycott" is of a *single* person, the conspiracy *falls or does not fall within the Act depending on whether the necessary element of public injury can be found in other facts.*

In support of the contention that a group boycott is illegal *per se,* petitioner and the Solicitor General cite *Binderup v. Pathe Exchange,* 263 U.S. 291, *Fashion Originators' Guild v. Federal Trade Commission,* 312 U.S. 457, *United States v. Columbia Steel Co.,* 334 U.S. 495, *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons,* 340 U.S. 211, *Times-Picayune Pub. Co. v. United States,* 345 U.S. 594, and *Northern Pacific R. Co. v. United States,* 356 U.S. 1. A boycott was involved in only the first two of these cases, and in each *the target was the public,* injured by an attempted fixing of

31. The Solicitor General's brief contains an argument that if a public injury is necessary to a violation of the Act

> those bent on restrictive trade policies would be enabled to pursue those policies at large by making a few conspicuous examples of nonconforming individual traders" (p. 13).

Had it been charged or proved that the respondents were "bent on restrictive trade policies" and had acted against petitioner as an example to whip other traders into line to conform to respondents' wishes, this would be a different case. But that was not charged, was not proved, and is wholly absent in this case.

price or working a monopoly. None of these cases supports petitioner's contention, and, as we shall see (pp. 60-63, *infra*) lower courts in other cases have rejected the very assertion about the purport of these decisions made by petitioner. But first we examine these decisions directly.

In *Binderup v. Pathe Exchange*, 263 U.S. 291, the plaintiff operated a chain of motion picture theatres in Nebraska (p. 301), and defendants were distributors. As the Court said (pp. 302, 303):

> "The complaint further alleges that these distributors control the distribution of *all* films in the United States and that the *films cannot be procured from others.* * * * It is alleged that * * * the Omaha Film Board of Trade was organized for the purpose of enabling these distributors *to control prices and dictate terms to their patrons* in Nebraska and other States."

This the Court repeated (p. 311):

> "The distributors, * * * controlled the distribution of *all* films in the United States and the exhibitor *could not procure them from others.* The direct result of the alleged conspiracy and combination not to sell to the exhibitor, therefore, was to put an end to his participation in that business."

Thus the *Binderup* case was not only a monopoly case but a case of a conspiracy having price fixing as its object and directed at a class.

Fashion Originators' Guild v. Federal Trade Commission, 312 U.S. 457, involved a trade association and combination of manufacturers, sellers and distributors of women's garments and textiles to destroy the competition of the entire class of manufacturers who copied designs. The boycott and refusal to sell to retailers who sold garments made by the other manufacturers was but a tool to the end. By the boycott they compelled 12,000 retailers throughout the entire United States to agree not to buy from any manufacturer who copied designs. There were 176 manufacturers who were Guild members, they occupied "a commanding position in their line of business" and since "most retail dealers [had] to stock some of the products of these manufacturers," the power of

the combination was great (p. 462). The purpose and consequence of the conspiracy was to put out of business a whole class of competing manufacturers and thus to remove a source of supply to the public. The boycott was such in the strictest sense of the Taft definition (p. 52, *supra*).

That the case is not relevant is shown by its citation, on the subject of boycotts, of *Eastern States Lumber Ass'n v. United States*, 234 U.S. 600, where a nation-wide association of retail dealers combined to boycott *all* wholesale lumber dealers who sold anywhere directly to the customer. Cases of mass boycotts, affecting large numbers of manufacturers and dealers, simply have no application to a case such as the present, as is epitomized in the passage from *Neumann v. Bastian-Blessing Co.*, 70 F. Supp. 447, quoted at pp. 39, 40, *supra*. In both the *Shotkin* and *Feddersen* cases, pp. 36-38, *supra*, the court cited the *Fashion Originators'* case, and then, applying the law to the facts, similar to those in the present case, held that there was no cause of action under the Sherman Act.

The other decisions of this Court cited on the subject did not in fact involve boycotts but contain passing reference to boycotts or refusals to sell. The earliest is *United States v. Columbia Steel Co.*, 334 U.S. 495, where the Court said (p. 522):

> "For example, where a complaint charges that the defendants have engaged in price fixing, *or have concertedly refused to deal with non-members of an association*,[21] or have licensed a patented device on condition that unpatented materials be employed in conjunction with the patented device, then the amount of commerce involved is immaterial because such restraints are illegal *per se*. Nothing in the *Yellow Cab* case supports the theory that all exclusive dealing arrangements are illegal *per se*.

> "[21] *Associated Press v. United States*, 326 U.S. 1; *Eastern States Retail Lumber Dealers' Association v. United States*, 234 U.S. 600; *Montague & Co. v. Lowry*, 193 U.S. 38. See *Fashion Originators' Guild v. Federal Trade Comm'n*, 312 U.S. 457."

It will be seen that the reference here to refusal to deal is to a refusal to deal with "*non-members* of an association", i.e., a refusal directed against a whole class of persons. And all four of the cases cited to the proposition are of that nature. For example, in the *Associated Press* case,

> "The heart of the government's charge was that appellants had by concerted action set up a system of By-Laws which prohibited *all AP* members from selling news to *non-members* and which granted *each* member powers to block *its* non-member competitors from membership." (326 U.S. 1, 4)

And by contrast to the facts of this case (p. 13):

> "Inability to buy news from the largest news agency, or any one of its multitude of members can have most serious effects on the publication of competitive newspapers * * *."

If the Court had meant to hold that mere concert of two or more not to deal with another was illegal *per se*, it would have been unnecessary to discuss the peculiar nature of the news publishing business.

We have already seen that both the *Eastern States* case and the *Fashion Originators'* case were boycotts of a whole class. The next case cited in the *Columbia Steel* case—*Montague & Co. v. Lowry*—vividly illustrates that fact. It involved a conspiracy of tile manufacturers in the United States and six San Francisco tile dealers: "In its scope it included * * * every manufacturer of tiles wherever situate in the United States * * *" (115 Fed. 27, 29). The Court epitomized the situation thus (193 U.S. 38, 45):

> "*It is not the simple case of manufacturers* [note the plural] *of an article of commerce between the several States refusing to sell to certain other persons.* The agreement is between manufacturers and dealers belonging to an association in which the dealers agree not to purchase from manufacturers

> not members of the association, and not to sell unset tiles to any one not a member of the association for less than list prices, which are more than fifty per cent higher than the prices would be to those who were members, while the manufacturers who became members agreed not to sell to any one not a member, and in case of a violation of the agreement they were subject to forfeiting their membership. By reason of this agreement, therefore, the market for tiles is, as we have said, not only narrowed but the prices charged by the San Francisco dealers for the unset tiles to those not members of the association are more than doubled."

Thus all manufacturers were forced to join the association by a boycott of the *whole class* of those who did not; this in turn deprived the whole class of non-member dealers of a source of supply, and all to the end and purpose of fixing prices.

Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, is cited by petitioner for the sentence (p. 214):

> "Seagram and Calvert acting individually perhaps might have refused to deal with petitioner or with any or all of the Indiana wholesalers. But the Sherman Act makes it an offense for respondents to agree among themselves to stop selling to particular customers."

But the Court was not stating a universal rule; it was speaking of "Seagram and Calvert", i.e., two parties conspiring for the *purposes* involved in that case. The case was one of "agreement among competitors to fix maximum resale *prices* of their products" (p. 213), where "the complaint charged that respondents had agreed or conspired to sell liquor only to those Indiana wholesalers who would resell at prices fixed by Seagram and Calvert, and that this agreement deprived petitioner of a continuing supply of liquor to its great damage" (p. 212). Thus plaintiff was but one of a class injured by the archetype of illegal conspiracy, one

to fix prices to the public. The case is like *United States v. Frankfurt Distilleries*, 324 U.S. 293, which neither petitioner nor the Solicitor General cites. That case involved a price-fixing conspiracy with a boycott to coerce all who would not conform.

The next citation chronologically, *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, involved no problem similar to anything here; it was a "tie in" case, and defendants' conduct was held not to be illegal. It is cited by petitioner because of the statement (p. 645):

> "Consequently, no Sherman Act violation has occurred unless the Publishing Company's refusal to sell advertising space except *en bloc*, viewed alone, constitutes a violation of the Act. Refusals to sell, without more, do not violate the law. Though group boycotts, or concerted refusals to deal clearly run afoul of § 1, *Kiefer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211, 214 (1951); *Associated Press v. United States*, 326 U.S. 1 (1945); see *United States v. Columbia Steel Co.*, 334 U.S. 495, 522 (1948), different criteria have long applied to qualify the rights of an individual seller."

The Court was addressing itself to refusals to sell to any one except on certain restrictive conditions. And the cases cited to the quoted statement are those already discussed. No one reading the *Times-Picayune* case can escape observing its profound emphasis on effects on the "marketplace" (p. 605) or the need that the seller enjoy a monopolistic position for the tying product (p. 608) or that a "'substantial' volume of commerce" in the tied product be restrained (p. 607) or that competitors be foreclosed from a "substantial market" (p. 610) or on the necessity that the "volume of commerce affected [be] not 'insignificant or insubstantial'" (p. 610). A case involving more "insignificance" than the present could hardly be imagined.

The last of the citations of petitioner and the Solicitor General is *Northern Pacific R. Co. v. United States*, 356 U.S. 1. It involved

no boycott or joint refusal to sell;[32] the sole reference is in a passage (see p. 34, *supra*) where the Court, in explaining the rule of *per se* unreasonableness, said (p. 5):

> "Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 210; division of markets, *United States v. Addyston Pipe & Steel Co.*, 85 F. 271; aff'd 175 U.S. 211; group boycotts, *Fashion Originators' Guild v. Federal Trade Comm'n*, 312 U.S. 457; and tying arrangements, *International Salt Co. v. United States*, 332 U.S. 392."

The authority cited in this passage with respect to "group boycotts" is the *Fashion Originators'* case, and that case, we have seen, related to "boycott" in its true sense of a coercion on an entire class to produce consequences injurious to the public.

It will be observed further that the term used is not "boycott" but "group boycott". Since "boycott" itself means combined action by two or more, and since the term "group boycott" is presumably not a tautology but was used to signify something more than "boycott", it would seem to signify not a boycott by a group but the boycott of a group; that is, a boycott directed against a class of persons. This is the factual setting of the cases in which the term "group boycott" is used and in the other cases where a joint refusal has been held illegal.

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32. Like *International Salt Co. v. United States*, which it cites, *Northern Pacific R. Co. v. United States*, is a tie-in case. Northern Pacific owned several million acres of land, of which, necessarily, it had a monopoly, and leased the land on a host of arrangements requiring shipment on Northern Pacific alone. Thereby it excluded *all* transportation competitors, and the consuming public, the lessees of the land, were excluded from access to *all* other suppliers of transportation. International Salt, the country's largest producer of salt for industrial uses (p. 394), had a patent monopoly on certain salt dispensing machines, which it leased on condition the lessee use its salt. The tie-in excluded *all* competing salt manufacturers from a market consisting of over 900 lessees.

The understanding by the lower courts of this Court's decisions.

These various decisions of this Court have more than once been cited to lower courts as authority for a flat rule that any joint refusal to deal is illegal *per se*. The contention has uniformly been rejected. In *Hudson Sales Corp. v. Waldrip*, 211 F.2d 268 (5 Cir.), cer. den. 348 U.S. 821, the Court said (footnote 10, p. 273):

> "Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U. S. 211, 71 S. Ct. 259, 95 L. Ed. 219; and * * * are not at all to the contrary. * * * the first head note in Kiefer-Stewart reads, 'An agreement among competitors in interstate commerce to fix maximum resale prices of their products violates the Sherman Act.' "

A full elucidation of the subject appears in *Interborough News Co. v. Curtis Publishing Co.*, 127 F. Supp. 286 (S.D. N.Y.), affirmed in 225 F.2d 289 (2 Cir. 1955), where plaintiff charged defendants with conspiracy not to deal with him. A motion to dismiss was granted at the close of plaintiff's case,[33] overruling the same mechanical argument as made by petitioner here. The Court of Appeals said (pp. 293, 294):

> "The nub of the matter is that the peculiar features of schemes for price fixing and elimination of competition * * * are wholly absent here.
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> * * * * * * *
>
> "These observations also suffice to dispose of the claim that there was an illegal boycott and therefore a *per se* violation of the Sherman Act. * * *
>
> "Other authorities on which plaintiff leans heavily furnish no support to plaintiff's contentions because in each of them there was some feature of price fixing or stifling of competition. * * * Fashion Originators' Guild v. Federal Trade Commission, 1941, 312 U. S. 457, 668, 61 S. Ct. 703, 85 L.

33. Dismissal at the close of a plaintiff's proof is a directed verdict (R.C.P. Rule 50a), and a summary judgment is proper if a directed verdict would be proper on the same facts. *Marion County Coop. Ass'n v. Carnation Co.*, 214 F.2d 557 (8 Cir. 1954); *Byrnes v. Mutual Life Ins. Co. of New York*, 217 F.2d 497, 501 (9 Cir.).

Fd 949; Keifer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 1951, 340 U.S. 211, 71 S. Ct. 259, 95 L. Ed. 219."

The District Court had said (127 F. Supp. 286, 300-301):

"Plaintiff's abstract proposition of law urged in this case that a 'boycott' by others of even one person engaged in interstate commerce is now to be deemed a *per se* violation of § 1 of the Act, and that no inquiry need be made in such case as to the substantiality of the restraint imposed by the boycott on the affected commerce, appears, at first glance, to be supported by the more recent decisions of the Supreme Court. [Citing Times-Picayune, Kiefer-Stewart and the Columbia Steel cases] However, I have doubt that such all-encompassing condemnation of group refusals to deal, as plaintiff urges, was intended by those cases. *On analysis, it seems that the boycott itself was not condemned as an unreasonable restraint of trade* in each of those cases, but *rather the Court condemned either what was sought to be accomplished by* the concerted refusals to deal *or what was the necessary result* thereof. *Hence, branding of defendants' acts a 'boycott' and therefore a per se violation of the Act is not justified* by a mere showing of the refusal by defendants to deal with plaintiff and their choice to deal with the 13 competing wholesalers."

"The 'purpose' of the accused agreement, *i.e.*, the result sought to be achieved, is decisive in determining liability to a party claiming to be injured by reason of the claimed violation of § 1.

* * * * * * *

"The final test to be applied * * * to determine whether § 1 of the Sherman Act was violated is whether the defendants' several refusals to deal with plaintiff necessarily had or will have any substantial pernicious effect on the commerce concerned in the sense that an adverse effect therefrom will be felt by the public. No such element of public injury is proven by the testimony and exhibits in the case. I am not persuaded that as a result of defendants' conduct, the purchasing public had to pay any increase in price, suffered any

diminution in the quality or kind of service prevalent in the market prior to the defendants' acts complained of, or that there was any effect resultant from defendants' act detrimental to any person but the plaintiff."

In footnote 13 it analyzed all the prior decisions of this Court discussed above:

"In Eastern States Retail Lumber Dealers' Ass'n v. United States, supra, the refusals to deal were found to in fact suppress competition and interfere with the natural flow of commerce, 234 U.S. at page 614, 34 S.Ct. 951, and it appears that they tended toward the creation of a monopoly in favor of the members of the association. In Binderup v. Pathe Exchange, supra, the case was in the Supreme Court on appeal from the affirmance of a motion to dismiss the complaint which alleged *inter alia* that the group refusal to deal was *intended* [italics in original] to restrain the interstate commerce involved. 263 U.S. at page 312; 44 S.Ct. 96. In Fashion Originators' Guild of America v. Federal Trade Comm., supra, the boycott was held to tend toward the creation of a monopoly in the participants. 312 U.S. at page 466, 61 S. Ct. 703. In Associated Press v. United States, supra, the Court condemned an arrangement or combination 'designed to stifle competition', 326 U.S. at page 19, 65 S. Ct. at page 1424, which was unreasonable in the light of the significance of the restraint in relation to [the] particular industry', 326 U.S. at page 27, 65 S. Ct. at page 1428. In Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, supra, the concerted refusals to deal were condemned not as such but because they were the implementation of a 'combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce * * *', which is illegal *per se*. 340 U.S. at page 213, 71 S. Ct. at page 260; Times-Picayune Pub. Co. v. United States, supra [345 U.S. 594, 73 S. Ct. 889], dealt with an individual's refusal to deal. The dictum 'group boycotts, or concerted refusals to deal, clearly run afoul of § 1 * * *' is followed by citations to Kiefer-Stewart

Co. v. Joseph E. Seagram & Sons and Associated Press v. United States, both discussed herein."

Conspiracies to the injury of a "single trader".

As already noted (p. 23, *supra*), both petitioner and the Solicitor General seek to phrase the issue in terms of whether a violation of the Act can be worked by an injury to a "single trader" (E.g., Sol. Gen. Br. p. 5). This is not the issue. A conspiracy injuring a single trader might, on the facts of a particular case, also involve injury to the public; for example, if the consequence were to leave but one other trader in the market, thereby creating a monopoly, or the purpose was to eliminate an obstacle to a price fixing scheme. That is precisely the character of the two cases cited by the Solicitor General, the *Binderup* case (discussed, p. 54, *supra*) and *Lorain Journal v. United States*, 342 U.S. 143. The latter was not a conspiracy case, but a case of single party monopoly by a newspaper over the mass dissemination of local and national news and advertising in its community with 99% of the coverage of the community's families. There was no other daily newspaper. After another started a radio station, the defendant refused to accept advertising from anyone who advertised over the radio station, its express purpose and intent being to destroy the station completely (pp. 149, 151).

> "Attainment of that sought-for elimination would automatically restore to the publisher of the Journal its substantial monopoly in Lorain of the mass dissemination of all news and advertising, interstate and national, as well as local. It would deprive not merely Lorain but Elyria and all surrounding communities of their only nearby radio station." (p. 150)

Furthermore,

> "WEOL offered competition by radio in all these fields so that the publisher's attempt to destroy WEOL was in fact an attempt to end the invasion by radio of the Lorain newspaper's monopoly of interstate as well as local commerce." (p. 151)

The Solicitor General also cites *Loewe v. Laulor*, 208 U.S. 274; *Duplex Printing Press Co. v. Deering*, 254 U.S. 443; and *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn.*, 274 U.S. 37. These were the cases of labor disputes that aroused so much controversy. They were analyzed in *Apex Hosiery Co. v. Leader*, 310 U.S. 469, and have no more vitality than *Apex* left them. In the *Apex* case, the Court described these cases (p. 505, 506):

> "* * * in *Loewe v. Laulor*, 208 U.S. 274 * * * [t]he combination or conspiracy charged was that of a nation-wide labor organization to force all manufacturers of fur hats in the United States to organize their workers by maintaining a boycott against the purchase of the product of non-union manufacturers shipped in interstate commerce. * * * by which, through threats to the manufacturer's wholesale customers and their customers, the Union sought to compel or induce them not to deal in the product of the complainants * * *. This Court pointed out that the restraint was precisely like that in *Eastern States Retail Lumber Dealers Co. v. United States*, 234 U.S. 600, 610, 614. * * * Like problems found a like solution in *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, and in *Bedford Cut Stone Co. v. Journeymen Stone Cutters Assn.*, 274 U.S. 37; * * *.
>
> * * * * * * *
>
> "It will be observed that in each of these cases where the Act was held applicable to labor unions, *the activities affecting interstate commerce were directed at control of the market and were so widespread as substantially to affect it.*"

The Solicitor General (Br. 3) describes the decision of the Court of Appeals in the present case as stating that

> "concerted conduct 'directed at harming the opportunity of a single trader to compete' (R. 172) is not an unreasonable prohibited restraint if, notwithstanding such restraint, the market is subject to strong competitive forces and defendants have neither sought nor obtained power to exercise market control".

This is too narrow a description, for it mentions only certain facts showing absence of public injury. The court did not exclude other factors that might involve public injury; it held (R. 171) that there was neither intent nor purpose to affect a change in, or an influence on, prices, quantity, or quality, either directly or indirectly, and no effect. No matter how viewed, there is no public interest involved.

F. ANSWERS TO MISCELLANEOUS CITATIONS AND TO THE CONTENTION THAT THE JUDGMENT RESTS ON A DISPUTED ISSUE OF FACT.

The petitioner's brief cites several cases we have not yet mentioned. They have no possible bearing, and we summarize them in a footnote.[34]

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34. *Hart v. B. F. Keith Vaudeville Exchange*, 262 U.S. 271 dealt not with whether a claim for relief was stated, but purely with whether the District Court erred in dismissing for lack of jurisdiction. "* * * when a suit is brought in a federal court and the very matter of the controversy is federal it cannot be dismissed for want of jurisdiction 'however wanting in merit' may be the averments intended to establish a federal right." (pp. 273-4). Petitioner's brief in the present case is replete with statements that the courts below held that they were without "jurisdiction" (E.g., Br. 11, 12, 13, 20, 24). No issue of jurisdiction is involved. The courts both had and exercised jurisdiction to decide the cause.

In *Chattanooga Foundry and Pipe Works v. Atlanta*, 203 U.S. 390, affirming *Atlanta v. Chattanooga Foundry & Pipe Works*, 127 Fed. 23, a buyer of pipe sued the members of the combination held to be unlawful in *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, affirming *United States v. Addyston Pipe and Steel Co.*, 85 Fed. 271, which are cited in *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 5 for the principle that conspiracies to apportion territory are illegal.

United States v. Patten, 226 U.S. 525, involved a corner in all the cotton grown in the southern states in 1910 and all cotton left over from all prior years (pp. 535, 536), the purpose being "thereby to enhance artificially its price throughout the country" (p. 540).

Ramsay Co. v. Bill Posters Assn., 260 U.S. 501 was like *Montague & Co. v. Lowry*, 193 U.S. 38, which it cites (discussed at p. 56, *supra*). An association conspired to monopolize the business of bill posting in the entire country, limited membership, prohibited members from competing with each other or accepting work from *any* advertiser who gave any business to *any* non-member, fixed price schedules, and withdrew

Petitioner asserts that there were "genuine issues of fact" precluding a summary judgment (Br. 34-44), repeatedly arguing (e.g., pp. 37, 38, 40) that the "affidavits of respondents did not meet the question of the existence of the conspiracy". But, for the purposes of the motion, we assumed the truth of the allegation of a "conspiracy". The existence of a conspiracy is a question of fact, but whether the fact, in the setting of the other admitted facts, constitutes a violation of the Act is a question of law, wholly

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patronage from manufacturers furnishing posters to *any* non-member.

C. E. Stevens Co. v. Foster & Kleiser Co., 311 U.S. 255, came up on the complaint alone. It involved the same industry and the same type of activity as the *Ramsay* case (p. 258). The illegality of what was charged was admitted (p. 260), and the sole question raised was whether an allegation that plaintiff had been injured without alleging that he was unable to obtain posters from other sources adequately alleged damage. Petitioner cites this case to the point that ability to obtain goods from sources other than defendants is immaterial. But there the violation was clear, in view of the widespread nature of the boycott of the whole class of independents.

Anderson v. Shipowners Assn. of the Pacific, 272 U.S. 359, was a combination of those operating, owning or controlling substantially all American merchant vessels operating from Pacific Coast ports, whereby each agreed to employ no seaman unless approved by the Association.

The gist of *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30 was that (p. 41) "ten competitors in interstate commerce, controlling sixty per cent of the entire film business, have agreed to restrict their liberty of action by refusing to contract for display of pictures except upon a Standard Form which provides for compulsory joint action by them in respect of dealings with one who fails to observe such a contract with any Distributor, all with the manifest purpose to coerce the Exhibitor and limit the freedom of trade."

Moore v. Mead's Fine Bread Co., 348 U.S. 115, was a Robinson-Patman Act case, not a Sherman Act case.

United States v. South-Eastern Underwriters Assn., 322 U.S. 533, involved a conspiracy of those controlling 90% of the fire insurance and allied lines sold by stock companies in six states to fix premium rates, monopolize the business, and to that end to use boycotts and other coercion to force all non-members into the conspiracy (p. 535) and to compel all seeking insurance to buy from the conspirators. Defendants admitted (p. 536) that this was illegal if insurance was commerce, the sole issue in the case.

In *United States v. Griffith*, 334 U.S. 100, defendants were theater circuits which possessed the only theater in from 51% to 62% of the towns they served and used that position for the "acquisition or retention of effective market control" (p. 107).

ripe for decision on summary judgment.[35] Petitioner's argument comes down to the pure contention of law already discussed that mere joint refusal to deal is *per se* illegal conduct (p. 37).[36]

Petitioner argues that respondents' affidavits did not go into a variety of factual matters, such as the number of retail stores Hale operates and the dollar volume of its purchases. But none of these subjects was relevant. The fact that "literally hundreds if not thousands" of other retail stores do handle the products in question in San Francisco, that the number has constantly grown, and that numerous brands were available to petitioner pierced as sham the contention of monopolization. Issues of immaterial fact cannot preclude grant of summary judgment. If on undisputed facts, the law requires decision for a party, he is entitled to judgment regardless of the existence of issues of fact which, however they might be resolved after a trial, would not alter the result.[37]

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35. *Gary Theatres Co. v. Columbia Pictures Corp.*, 120 F.2d 891, 894 (7 Cir., 1941), quoted in *Sandidge v. Rogers*, 1958 Trade Cases, para. 69,191 (S.D. Ind. Oct., 1958):

"Whether a conspiracy exists is a question of ultimate fact but whether the facts bring defendants within the prohibition of the statute is a question of law."

Admiral Theatre Corp. v. Paramount Film Dist. Corp., 140 F. Supp. 686, 696 (D. Neb.):

"That, we perceive, presents a question of law that can and should be determined on the state of the instant record, by way of motion for summary judgment."

36. E.g., it argues (p. 40)

"* * * But clearly when an action involves a conspiracy *per se* in restraint of trade, market control is not an indispensable issue."

37. F.R.C.P. Rule 56 provides:

"* * * The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue *as to any material fact* and that the moving party is entitled to a judgment as a matter of law."

III. The charged conspiracy did not have the relation to interstate commerce necessary in order to come under the Sherman Act.

As said in *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 495:

> "The addition of the words 'or commerce among the several states' was not an additional kind of restraint to be prohibited by the Sherman Act but was the means used to relate the prohibited restraint of trade to interstate commerce for constitutional purposes * * *."

While it has been held that the amount of commerce is not important, conversely the nature of the restraint and its effect on what commerce is involved is crucial (*Apex*, p. 485). *Mandeville Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, summing up the present state of the law, held that the effect on interstate commerce must be "substantial" (p. 234). *Radovich v. National Football League*, 352 U.S. 445, repeated that the effect "must be substantial" (p. 453). Petitioner recognizes this requirement, for its brief states (p. 19) that "The filing of a bona fide complaint disclosing conduct in or affecting a *substantial amount* of interstate trade or commerce * * * meets the jurisdiction requirements of Section 4 of the Clayton Act." Granting that the complaint, as a pleading, sufficiently alleged the requisite interstate commerce, the undisputed showing on the motion for summary judgment showed that the effect on commerce was simply *nil*. As said in *Ruddy Brook Clothes v. British & Foreign Marine Ins. Co.*, 195 F.2d 86 (7 Cir.), cer. den. 344 U.S. 816:

> "The effect upon competition, *like that upon the flow of commerce*, was 'de minimis;' it could have had no 'appreciable' effect upon either. The restraint asserted was as impotent in its relation to either commerce or competition as a lighted match to the temperature of all outdoors." (p. 90)

We need but recapitulate the uncontradicted facts. Petitioner was able to obtain numerous brands of commodities, and the cer-

tain brands he was not able to buy were bought and sold by hundreds of other retailers in San Francisco, dozens of them in the Mission District alone. As many of the items are sold as before. The flow of products in interstate commerce has not diminished at all. Interstate commerce can be said to have been involved only in the sense that the brands of merchandise originated, it is alleged, outside of California and might have been purchased by petitioner if not denied him. But that merchandise still comes into California, to San Francisco, and to Mission Street. San Franciscans have washed the same amount of clothes, cooked the same number of meals, heard or seen the same number of radio and television programs, and bought the same number of washers, stoves and receiving sets, regardless of what retailer sold them.

All the decisions in precisely the kind of case petitioner presents have held that the necessary relation to interstate commerce is absent. Many have been cited in the foregoing pages of this brief. For example, in *Shotkin v. General Electric Co.*, 171 F.2d 236, 239 (10 Cir.), the court said,

> "the inability of plaintiff to sell the products of all or any of them in interstate commerce as a part of his business in Denver would in the very nature of things have infinitesimally little effect upon such commerce."[38]

In *Northern California Monument Dealers Ass'n v. Interment Ass'n*, 120 F. Supp. 93 (N.D. Cal.) the court said (p. 95):

> "Secondly, the subject of interstate commerce must be examined from the viewpoint of injury to the public. It is essential in this respect that the pleadings allege facts from which it can be determined as a matter of law that the alleged conspiracy contemplated or tended to restrain interstate commerce with harmful effect to the public interest."

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38. And see quotations at pp. 37, 38, *supra* from *Feddersen Motors v. Ward*, 180 F.2d 519 (10 Cir.), and at p. 61 from *Interborough News Co. v. Curtis Publishing Co.*, 127 F. Supp. 286.

And as stated on granting defendants' motion for summary judgment in *Brenner v. The Texas Company*, 140 F. Supp. 240, 243 (N.D. Cal.):

> "* * * reason tells us that even if the defendant companies did conspire to stop selling gasoline to plaintiff [a service station operator in Alameda County, California], nevertheless the motorists of California and Alameda County would continue to purchase the same amount of gasoline as they had prior to the closing of plaintiff's station. In which case neither more nor less gasoline would be available for export from California, thereby not affecting interstate commerce at all."

Not only has the quantity of merchandise flowing in commerce been undiminished, but the channels of commerce have not been used to work any kind of effect on the market or the consuming public. No matter from what angle this case is canvassed, there is a total lack of the necessary involvement of interstate commerce.

To borrow a statement from *Industrial Ass'n v. United States*, 268 U.S. 64, 84:

> "To extend a statute intended to reach and suppress real interferences with the free flow of commerce among the states, to a situation so * * * lacking in substance, would be to cast doubt upon the serious purpose with which it was framed."

IV. The Sherman Act did not establish a rule of private commercial tort law.

At pages 2, 3 and 23, *supra*, we stated the questions presented in this case. But in a very real sense, the essential issue may well be expressed thus: Is the Sherman Act to become a sort of section of a Federal Commercial Code treating of the law of commercial torts, or is its scope to remain consonant with "the serious purpose with which it was framed",[39] and with its de-

39. *Industrial Ass'n v. United States*, 268 U.S. 64, 84.

scription as a charter of liberty designed to protect the public in the market place?

No doubt Congress could have acted to create *private rights* in a field where the constitutional grant over interstate commerce empowered it to do so, just as it saw fit to do in the Interstate Commerce Act.[40] But it has always been understood that in the Sherman Act Congress did not so act. No more than the Federal Trade Commission Act was the Sherman Act designed as a prescription of rules of private commercial tort law. *International Shoe Co. v. Federal Trade Commission*, 280 U.S. 291, 298. In *Federal Trade Commission v. Klesner*, 280 U.S. 19, this Court, speaking through Mr. Justice Brandeis, overthrew an order by the Commission against an interior decorator to cease using the name "Shade Shop" as unfair competition with one Sammons, a prior user. The Court said (pp. 27-29):

> "But to justify the Commission in filing a complaint under § 5, the purpose must be protection of the public. The protection thereby afforded to private persons is the incident. * * *
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> * * * * * * *
>
> "The alleged unfair competition here complained of arose out of a controversy essentially private in its nature. * * * It is not claimed that the article supplied by Klesner was inferior to that of Sammons, or that the public suffered otherwise financially by Klesner's use of the words 'Shade Shop' * * *."

The Sherman Act was designed for a broad public purpose, to reach what were regarded as grave threats to the American

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40. Cf. remark in *Federal Trade Commission v. Klesner*, 280 U.S. 19, 26:

> "The provisions in the Federal Trade Commission Act concerning unfair competition are often compared with those of the Interstate Commerce Act dealing with unjust discrimination. But in their bearing upon private rights, they are wholly dissimilar."

system.[41] In consequence of the many decisions of this Court beginning with the *Standard Oil* case of 1911 and extending through the *Corn Products* case to the *Apex* and *Mandeville* cases, a veritable host of decisions has repeated that the treble damage action was authorized, not as the instrument of new private rights created by federal act, but as a means of enlisting private aid in reaching acts injurious to the public.[42] Without exception, when-

41. The legislative history has often been reviewed by this Court, and it would be idle to duplicate the massive research underlying Justice Stone's opinion in *Apex Hosiery Co. v. Leader*, 310 U.S. 469. However, a few quotations are illustrative.

Senator Sherman, in support of the original bill, stated, 21 Cong. Rec. pp. 2456-57:

> "* * * Each State can and does prevent and control combinations within the limit of the State. This we do not propose to interfere with. * * * but these [state] courts are limited in their jurisdiction to the State, and, in our complex system of government are admitted to be unable to deal with the great evil that now threatens us.
>
> "* * * The purpose of this bill is to enable the courts of the United States to apply the same remedies against combinations which injuriously affect the interests of the United States that have been applied in the several States to protect local interests.
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> * * * * * * * * *
>
> "* * * It is to arm the Federal courts within the limits of their constitutional power that they may cooperate with the State courts in checking, curbing, and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States."

Again, p. 2460:

> "I accept the law as stated by Mr. Dodd, that all combinations are not void, a proposition which no one doubts, but I assert that the tendency of all combinations of corporations, such as those commonly called trusts, and the inevitable effect of them, is to prevent competition and to restrain trade. This must be manifest to every intelligent mind. Still this can not be assumed as against any combination unless upon a fair hearing it should appear to a court of competent jurisdiction that the agreement composing such combination is necessarily injurious to the public and destructive to fair trade.
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> "I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case."

42. E.g., *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358, 365 (9 Cir.).

ever courts have perceived nothing in a case but a private wrong, they have relegated the complaining party to the common law or to state statutes.[43] In doing so they have often noted the unusual position conferred upon the private litigant. He may bring his action in a district court regardless of the amount in controversy (15 U.S.C. Sec. 15) unlike other suits arising "under the Constitution, laws or treaties of the United States" (28 U.S.C. § 1331). He may use the judgment in a prior government suit to establish a *prima facie* case of antitrust violation (15 U.S.C. § 16). If successful

43. For example, *Riedley v. Hudson Motor Car Co.*, 82 F. Supp. 8 (W.D. Ky.) quoted at p. 40, *supra*,

> "* * * the alleged wrong complained of in this action is a private wrong to plaintiff, and therefore not one within the prohibition of the actions authorized by * * * Title 15 U.S.C.A. Section 1." (p. 11.)

District of Columbia Cit. Pub. Co. v. Merchants & Manufacturers Ass'n, 83 F. Supp. 994, 997 D.C.:

> "* * * although there may exist an actionable wrong, the individual's right to redress cannot be asserted by virtue of the Sherman Act."

Two of the latest cases are *Sandidge v. Rogers*, 1958 Trade Cases, para. 69,191 (S.D. Ind. Oct. 1958) and *Radiant Burners, Inc. v. American Gas Assn.*, 1958 Trade Cases, para. 69,173 (N.D. Ill. Oct. 8, 1958). In the *Sandidge* case the court said:

> "The primary purpose of the Anti-Trust Laws is to prevent restraints of interstate commerce in the public interest, and to afford protection of the public from the subversive or coercive influences of monopolistic efforts and the right granted to plaintiff as a private suitor to seek reparation is secondary and subordinate in purpose.
>
> * * * * * * *
>
> "Plaintiff's second amended complaint alleges tortious acts and resulting grievous losses which might have been the subject of a common law action, or one prescribed by a state statute. However, her action when exposed by the uncontroverted facts fails under the Anti-Trust Laws of the United States."

In the *Radiant Burners* case, the court made a similar remark. Dismissing an amended complaint the court said:

> "In particular, the amended complaint fails to show an injury to the public sufficient to warrant imposition of the sanctions of the Anti-Trust Laws. The primary purpose of those laws is to protect the public; the private remedy of triple damages is incidental to that primary objective * * *. The plaintiff may, or may not, have some form of action against the defendants. It is clear, however, that it does not have an action under the Anti-Trust laws."

he is awarded the extraordinary remedy of treble damages plus attorney's fees. These privileges are inconsistent with vindication of a mere private wrong; they are consistent only with recognition of the private suit as an auxiliary means to pursue public wrongs. As said in *Bruce's Juices v. American Can Co.*, 330 U.S. 743, 751:

> "Where the interests of individuals or private groups or those who bear a special relation to the prohibition of a statute *are identical with the public interest in having a statute enforced*, it is not uncommon to permit them to invoke sanctions. This stimulates one set of private interest to combat transgressions by another without resort to governmental enforcement agencies. Such remedies have the advantage of putting back of such statutes a strong and reliable motive for enforcement, which relieves the Government of cost of enforcement. * * * It is clear Congress intended to use private self-interest as a means of enforcement and to arm injured persons with private means to retribution when it gave to any injured party a private cause of action in which his damages are to be made good threefold, with costs of suit and reasonable attorney's fee."[44]

The Court has never departed from these principles. To subtract them from the law would be to outmode an enormous bulk of reported decisions and to hold that the Sherman Act is merely another statute for the vindication of private wrongs flowing from conspiracy. The cases of alleged commercial torts that might be said to involve some "restraint", if that term is granted the literal meaning *Apex* denied it, are numerous. From the very nature of a "commercial tort" the "restraints" will involve commerce and, very likely, interstate commerce. The additional charge of

44. Cf. *Radiant Burners v. American Gas Assn.*, 1957 Trade Cases para. 68,909 (N.D. Ill. 1957):

> "The anti-trust laws, providing as they do the harsh penalty of triple damages, were not intended to promote the vindication of purely private wrongs, but to protect the public and the economy of the country from the crippling effects of monopoly."

conspiracy is an easy one to make, and wide latitude is permitted in proving it (Cf. *Theatre Enterprises v. Paramount Film Distributing Corp.*, 346 U.S. 537, 541; *Fanchon & Marco v. Paramount Pictures, Inc.*, 100 F. Supp. 84, 89-90 (S.D. Cal. 1951), aff'd 215 F.2d 167 (9 Cir.), cer. den. 345 U.S. 964. If "conspiracy" in a commercial tort is enough to create a Sherman Act case, the charge of conspiracy will become a talisman to convert all commercial quarrels into federal antitrust litigation. Reversal of the decision will overwhelm the federal courts with a veritable flood of trivial or private disputes, for to every commercial quarrel will be added the epithet "conspiracy".

The Solicitor General's brief asserts (p. 6) that "This Court [in *Radovich v. National Football League*, 352 U.S. 445] held that Congress has by legislative fiat, determined that the activities prohibited by the Sherman Act 'are injurious to the public'". But the *Radovich* case reaffirmed the *Apex* decision, and *Apex* plainly said that the Sherman Act provides "a remedy, public and private, for the public wrongs which flow from restraints of trade * * *", and it described the kind of restraints the Act prohibits as such as are "injurious to the public". If, as the Solicitor General seems to contend, *Apex* merely meant that whatever the Sherman Act prohibits is for that reason to be deemed injurious to the public, its careful discussion of public injury would seem pointless; the decision would then amount to no more than a holding that the Sherman Act prohibits what it prohibits. But what does it prohibit? The words "injurious to the public" were a criterion of what is prohibited—not all conspiracies working restrictions of trade—but only such as "had come to be regarded as a *special form* of public injury". This is exactly what this Court understood in *United States v. Masonite Corp.*, 316 U.S. 265, 282 (1942) when it referred to "the kind of public injury which the Sherman Act condemns."

In the *Radovich* case this Court rejected a contention that a private litigant must allege more (apart from his own damage) than the government must. But now petitioner and the Solicitor General ask the Court to hold that a private litigant need prove less. The Solicitor General's suggestion (Br. 3) that the ruling will affect public suits is unmeritorious. We know of no reported suit instituted by the government that has involved such a complete absence of public concern as the present case, and the role of the Department of Justice in enforcing the antitrust laws is much too important to be trivialized. As said in an article cited in the Solicitor General's brief:

> "The understandable search by enforcement agencies for universals in the interest of simplified enforcement and the trend toward more extensive coverage of the Sherman Act should not be permitted to obscure the aims of the statute."[45]

In order for petitioner to proceed with his alleged grievance in a federal court, nearly fifty years of construction of the Act must be rejected, for here there was no injury to the public, to the consumer, to the market. All this case involves is alleged denial to petitioner of a few brands. If he has been wronged, he should seek his remedy under common law principles or state statutes in state courts and should be denied access to a federal court because there is not the requisite diversity of citizenship.

CONCLUSION

The complaint and the undisputed facts show no case under the Sherman Act upon elementary principles long settled and never disturbed.

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45. Barber, "Refusals To Deal Under The Federal Antitrust Laws," 103 Univ. of Pa. L. Rev. 847, 885.

We respectfully submit that the judgment is right and should be affirmed.

Dated: December 22, 1958.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1958

No. 76

KLOR'S, INC., *Petitioner,*

vs.

BROADWAY-HALE STORES, INC., ADMIRAL CORPORATION, ADMIRAL DISTRIBUTORS, INC., ZENITH RADIO CORPORATION, WHIRLPOOL SEEGER CORPORATION, H. R. BASFORD COMPANY, RADIO CORPORATION OF AMERICA, LEO J. MEYBERG COMPANY, EMERSON RADIO AND PHONOGRAPH CORPORATION, JEFFERSON-TRAVIS, INC., PHILCO CORPORATION, PHILCO DISTRIBUTORS, INC., DALLMAN SUPPLY COMPANY, RHEEM MANUFACTURING COMPANY, GENERAL ELECTRIC COMPANY, GENERAL ELECTRIC DISTRIBUTING CORPORATION, OLYMPIC RADIO AND TELEVISION, INC., OLYMPIC TELEVISION OF NORTHERN CALIFORNIA, TAPPAN STOVE COMPANY, O'KEEFE & MERRITT COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S REPLY BRIEF.

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KLOR'S, INC., *Petitioner,*

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BROADWAY-HALE STORES, INC., ADMIRAL CORPORATION, ADMIRAL DISTRIBUTORS, INC., ZENITH RADIO CORPORATION, WHIRLPOOL SEEGER CORPORATION, H. R. BASFORD COMPANY, RADIO CORPORATION OF AMERICA, LEO J. MEYBERG COMPANY, EMERSON RADIO AND PHONOGRAPH CORPORATION, JEFFERSON-TRAVIS, INC., PHILCO CORPORATION, PHILCO DISTRIBUTORS, INC., DALLMAN SUPPLY COMPANY, RHEEM MANUFACTURING COMPANY, GENERAL ELECTRIC COMPANY, GENERAL ELECTRIC DISTRIBUTING CORPORATION, OLYMPIC RADIO AND TELEVISION, INC., OLYMPIC TELEVISION OF NORTHERN CALIFORNIA, TAPPAN STOVE COMPANY, O'KEEFE & MERRITT COMPANY,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S REPLY BRIEF.

I.

THE ANTITRUST LAWS OPERATE TO PROHIBIT RESTRAINTS UNDULY LIMITING COMPETITIVE OPPORTUNITIES OR COMMERCIAL FREEDOM.[1]

A. The use of chain buying power to suppress or eliminate competition or the entry into a conspiracy between horizontal competitive firms to suppress or eliminate competition is necessarily in restraint of trade.

1. A restraint of trade occurs when there is the elimination of freedom to trade in any level of distribution.

The brief for respondents takes the position that it is not a restraint of trade for a chain buying retailer with monopolistic power (Complaint, Pr. 5, p. 5, Pr. 6, p. 10, Pr. 6 g., h., Pr. 8, pp. 11-12) to organize a conspiracy to boycott against its competitor to eliminate competition. It is further contended that a conspiracy to boycott between horizontal competitive firms is not a restraint of trade. Respondents assert that such conduct is neither a restraint of trade nor an unreasonable restraint of trade. At p. 17 of their brief they announce: "The restriction of the alleged conspiracy in this case was not even a 'restraint of trade', because it neither had nor was intended to have any consequences or effect on the market or to the consumer." At p. 18 they announce that "the Act is not concerned with whether a particular retailer, sales agent, consignee or other dealer handles or sells a particular brand or commodity so long as there are

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[1]Report of the Attorney General's National Committee to Study the Antitrust Laws (1955), 24-25, 132-137.

See also: Vernon A. Mund, The Right to Buy—and Its Denial To Small Business, Report for the Select Committee on Small Business, 85th Cong., 1st Sess. 1957, Doc. No. 32.

many others selling it, there being no effect and no purpose to work an effect on prices, quality or quantity available to the public and no monopoly, particularly where numerous competing brands are available."

It is respectfully urged that the basic error in the respondents' position is that they fail to concede that the antitrust laws operate to insure a free and open market, in every level of the distributive process. The antitrust laws clearly operate to prohibit conduct which prevents free entry and access into the channels of trade and commerce. (See Kirkpatrick, Commercial Boycotts as Per Se Violations of the Sherman Act, 10 G. Washington L. Rev., 302, 387.)

In *United States v. Yellow Cab Co.*, 1947, 332 U.S. 218, this Court stated, at 226:

> "Likewise irrelevant is the importance of the interstate commerce affected in relation to the entire amount of that type of commerce in the United States. The Sherman Act is concerned with more than the large, nation-wide obstacles in the channels of interstate commerce. It is designed to sweep away all appreciable obstructions so that the statutory policy of free trade might be effectively achieved. As this Court stated in Indiana Farmer's Guide Co. v. Prairie Farmer Co., 293 U.S. 268, 279, 55 S.Ct. 182, 185, 79 L. Ed. 356, 'The provisions of §§ 1 and 2 have both a geographic and distributive significance and apply to any part of the United States as distinguished from the whole and to any part of the classes of things forming a part of interstate commerce'."

Accordingly, it is clear that the antitrust laws are fundamentally concerned with prohibiting conspiracies or the use of monopolistic power which prevent, suppress or eliminate competition in any level or channel of commercial conduct. A single competitor, given express rights under Section 4 of the Clayton Act, has a cause of action against those who have conspired to suppress or eliminate his competition. A trader has the right to be free of a conspiracy designed to suppress or eliminate his competition under Section 4. *Albert Pick Barth Co. v. Mitchell Woodbury Corp.*, 1st Cir., 1930, 41 F. 2d 148; 1932, 57 F. 2d 96; *Monarch Tobacco Works v. American Tobacco Co.*, W. D. Ky., 1908, 165 Fed. 774; *Victor Talking Machine Co. v. Kemeny*, 3d Cir., 1921, 271 Fed. 810; *William Goldman Theatres v. Loew's Inc.*, 3d Cir., 1945, 150 F. 2d 738; *Ball v. Paramount Pictures, Inc.*, 3d Cir., 1948, 169 F. 2d 317; *Package Closure Corp. v. Sealright Company*, 2nd Cir., 1944, 141 F. 2d 972; *Parmelee Transportation Co. v. Keeshin*, N. D. Ill., 1956, 144 F. Supp. 480, 485, as stated there:

> "The right to deal with whom one pleases does not include 'agreeing or combining with another person in order to deprive a third person of a complete freedom of contract', United States v. Interstate Circuit, Inc., D.C.N.D. Tex., 1937, 20 F. Supp. 868, 872."

The admission of a conspiracy to single out a competitor and cause it direct harm so as to eliminate its competition admits a distinct offense under the Sherman Act. *United States v. Kissel*, 1910, 218 U.S. 601.

Equally clear is that monopolistic power may not be used to suppress, eliminate or prevent competition.

In addition to *United States v. Griffith*, 1948, 334 U.S. 100, see *American Federation of Tobacco Growers v. Neal*, 4th Cir., 1950, 183 F. 2d 869; *White Bear Theatre Corp. v. State Theatre Corp.*, 8th Cir., 1942, 129 F. 2d 600; *Kobe, Inc. v. Dempsey Pump Co.*, 10th Cir., 1952, 198 F. 2d 416.

Such use of conspiratorial power or monopolistic power is illegal per se. *International Salt Co. v. United States*, 1947, 332 U.S. 392. It is clear that in this setting of suppression or exclusion of competition by conspiracy or monopolistic power allegations in an antitrust complaint may be phrased in terms of the single plaintiff, both in the object and effect of the conspiracy or monopoly power. *Binderup v. Pathe Exchange*, 1923, 263 U.S. 291, and cases cited supra.

The brief for respondents admits that there existed a conspiracy against petitioner, but it attempts to deny that it has admitted the allegations of petitioner as to monopolistic chain buying power (R. 11) of respondent Broadway-Hale. (Brief for respondents, pp. 11-12.) But clearly the issues of monopolistic chain buying power and monopolistic intent condemned by Section 2 of the Sherman Act cannot be ended by sole reference to the total number of competitors in a given market. *United States v. Paramount Pictures, Inc.*, 1948, 334 U.S. 131, 166-173 (Percentage of total number of theatres of defendants to total number of theatres operated by non-defendants irrelevant); *Times Picayune Pub. Co. v. United States*, 1953, 345 U.S. 594, 615-621 (market control viewed in terms of sales of classified lineage,

general display lineage); *United States v. American Tobacco Co.*, 1946, 328 U.S. 781 (monopoly analyzed in terms of percentage of production, net worth, advertising expenditures, percentage of purchases of tobacco, and percentage of cigarette sales).

Mere reference to the advertising pages of the telephone book accordingly does not allow the petitioners to assert that the issues of monopolistic power and specific intent to monopolize have been eliminated by their affidavits in summary judgment.

2. Group refusals to deal by otherwise competitive firms are unlawful because they unduly restrict competitive opportunities or commercial freedom, replace the free market with group power, and create a power to fix prices.

The respondents have further urged that they have the lawful power to determine who shall or shall not be a competitive trader. Private parties it is urged can arrogate unto themselves the determination of who shall exist in the market place consistent with the antitrust laws. This rests on the argument that an unlawful group refusal to deal is unlawful only when there is coercion involved and only when a group is being boycotted. (Brief for Respondents, pp. 51-65.) But as to the first contention, the respondents have conveniently ignored the point that the term boycott is not restricted to secondary or coercive conduct. Even if it were the complaint alleges that Broadway-Hale coercively used its monopolistic chain buying power to organize a group refusal to deal. (R. 11-12.) Further, under the complaint the petitioner may prove the coercion of Broadway-Hale in combination with

one other manufacturer or distributor against other respondents.

36 *Am. Jur.*, Monopolies, Combinations, etc., § 27, p. 508, defines boycotts as follows:

> "The law recognizes what may be called two species of boycotts—one a primary boycott that is applied directly and alone to the offending person, by withdrawing from him all business relations on the part of the organization that initiated the boycott, and the other a secondary boycott that becomes effective when the members of the organization refuse to have any business relations with persons dealing with the offender until he has yielded to the demands of the organization."

This Court as has previously been shown has held that every group refusal to deal is per se unlawful under the Sherman Act. The *Binderup* case, supra, and *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 1951, 340 U.S. 211, both were essentially primary boycotts by competing firms. Thus the Court stated in *Binderup*, 263 U.S. 291, 312:

> "It is doubtless true that each of the distributors, acting separately could have refused to furnish films to the exhibitor without becoming amenable to the provisions of the act, but here it is alleged that they combined and conspired together to prevent him from leasing from any of them. The illegality consists, not in the separate action of each, but in the conspiracy and combination of all to prevent any of them from dealing with the exhibitor."

And, of course, *Binderup* completely disposes of the argument that a boycott is unlawful only when organized against a group. (See contentions, Brief for Respondents, pp. 59-60.)

The contention that the antitrust laws applied only to secondary boycotts was expressly rejected in *Professional & Business Men's Life Ins. Co. v. Bankers Life Co.*, D.C. Mont. 1958, 163 F. Supp. 274, 281-283.

An agreement by the powerful interstate suppliers of competitive merchandise involved here to eliminate or suppress competition, an unlawful end, by a group refusal to deal or boycott, an unlawful means, is necessarily a conspiracy in restraint of trade: (a) it is a non-ancillary agreement between competitors limiting competition, unlawful at common law. *United States v. Addyston Pipe & Steel Co.*, 6th Cir., 1898, 85 Fed. 271 (see Vernon A. Mund, op. cit., Chap. I, pp. 1-9); (b) it has the power by reference to the number of respondents and by reference to the quality and demand for their articles of commerce to dictate control and access to the market place, a power which has admittedly been exercised. *Eastern States Retail Lumber Dealers Association, et al. v. United States*, 1914, 234 U.S. 600; (c) it has the power to fix prices and there would exist a natural tendency for this group, being composed of the leading suppliers of merchandise, in league with the dominant retailer, successful in their agreement to boycott petitioner, to control prices. *F.T.C. v. Fashion Originators' Guild*, 2nd Cir., 1940, 114 F. 2d 180; (d) it has replaced the free market with group power which by reference to

the obvious need of the products involved for successful retail operation, stands as a necessary threat to all existing and potential competitors. *United States v. New Orleans Ins. Exch.*, D.C. La. 1957, 148 F. Supp. 915, 920, affirmed 355 U.S. 22. See also *United States v. Nationwide Trailer Rental System, Inc.*, D.C. Kan. 1957, 156 F. Supp. 800, affirmed 355 U.S. 10; (e) it has deprived a trader of his right to compete and has suppressed his competitive opportunities by unlawful means. *Binderup v. Pathe Exchange*, supra; *William Goldman Theatres v. Loew's, Inc.*, 3d Cir., 1945, 150 F. 2d 738.

It is clear that Justice Stone would not support the contentions of the respondents. In *Bigelow v. RKO*, 1945, 327 U.S. 251, he expressly held that a conspiracy to discriminate violated the antitrust laws regardless of whether or not it actually fixed prices, and held that a private trader had the right to be free of the restraints of an unlawful conspiracy. (327 U.S. 251, 262.) The opinion expressly rested on the assumption that the fixing of prices was not necessarily involved. (327 U.S. 251, 266.)

The quotations from *Apex* cited by respondents at page 31 of their brief expressly reserved the phrase "or otherwise control the market to the detriment of purchasers or consumers of goods and services", "or otherwise take from buyers or consumers the advantages which accrue to them from free competition in the market", "or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition". A conspiracy to eliminate or

suppress competition and a trade boycott are the very types of activity which take from purchasers or consumers the advantages of free competition.

II.

THE RESPONDENTS CANNOT CLAIM ANY LEGAL DEFENSE TO THEIR CONDUCT.

A. "Public injury" in the Radovich case was decided as a matter of law.

Respondents' contention that the doctrine of "public injury" precludes any liability under the antitrust laws is based on the argument that the invalidation of "public injury" in the *Radovich* case is restricted to the allegations of that complaint. (Brief for Respondents, p. 47.) But the briefs in the *Radovich* case simply do not support this contention. The doctrine of "public injury" in *Radovich* was invalidated as a matter of law. The following legal arguments were made in the *Radovich* case, inter alia: (1) The antitrust laws establish themselves the standards of commercial conduct deemed inimicable to the public good. (Brief for Petitioner, *Radovich v. National Football League, et al.*, United States Supreme Court, No. 94, p. 20, Brief for the United States as Amicus Curiae, pp. 11-14.) (2) Section 4 of the Clayton Act expressed a Congressional purpose to afford relief as to conduct forbidden by the antitrust laws which caused personal injury. (Brief for Petitioner, *Radovich v. National Football League,* United States Supreme Court, No. 94, pp. 19, 22.) (3) The lower courts had held

that a prima facie case was established under Section 4 upon the showing of a violation of the antitrust laws and injury arising from the violation. (*Id.*, at pp. 23-25); *City of Atlanta v. Chattanooga Pipe and Foundry Co.*, 6th Cir., 1903, 127 Fed. 23, aff'd 1906, 203 U.S. 390; *Wheeler Stenzel Co. v. Nat'l Window Glass Jobbers Ass'n*, 3d Cir., 1907, 152 Fed. 864, 874; *Monarch Tobacco Works v. American Tobacco Co.*, C.C. Ky., 1908, 165 Fed. 774, 777; *Albert Peck Barth Co. v. Mitchell Woodbury Corp.*, 1st Cir., 1932, 57 F. 2d 96. The private antitrust action is simply an action supported by Congress which gives an injured party direct relief against conduct condemned in the antitrust laws. *City of Atlanta v. Chattanooga Pipe and Foundry Co.*, 1906, 203 U.S. 390, 397. (4) The concept of public injury is a judicial imposition on the antitrust laws which is not supported by the words of Section 4 of the Clayton Act or by Congressional purposes. (*Id.*, at pp. 19, 22.) The Senate debates over the enactment of the Sherman Act clearly expressed a desire to prevent the oppression of the small trader, and to establish the common law doctrines of the free market in his favor. See Vernon A. Mund, op. cit., p. 13. (5) The concept of public injury allows each Court to express its views on what it considers the public good and permits the antitrust laws to become a sea of doubt. (*Id.*, at pp. 34-35.) (6) Basic to the concept of "public injury" is the categorizations of conduct which alone are in violation of the antitrust laws to price fixing, division of territories, deterioration of quality, limitations on production. But it is clear that this Court has expressly

held that these categories do not exhaust the type of conduct banned in the Sherman and Clayton Acts. (Petitioner's Reply Brief, *Radovich v. National Football League, et al.*, United States Supreme Court, No. 94, pp. 18-19.)

The doctrine of public injury did not emanate from this Court since the Court had held in the *Binderup* case that a private action involved only the questions of whether the matters were matters of interstate trade and commerce, and whether the conduct of the defendants was in restraint of such trade.

Respondents also contend that a number of lower Court cases allow them to assert the claim of no "public injury". (Brief for Respondents, pp. 42-43.) They cite cases decided after the *Radovich* decision. But none of the cases cited by respondents therein discussed the *Radovich* decision.

B. There is no legal defense to a conspiracy to suppress the business of a trader by group boycott.

1. The decisions cited by the respondents do not support the contention that the antitrust laws allow a conspiracy to boycott between horizontal competitive interstate firms alone or at the instance of a monopolistic chain buyer.

A conspiracy to boycott is illegal per se. Any combination agreeing to refuse to deal is per se engaged in unlawful conduct. Such a conspiracy is conclusively presumed to be unreasonable. It makes no difference whether the motives of the participants are good or evil, whether the boycott is accomplished by express contract or by some more subtle means; whether the participants possess market control,

whether the amount of interstate commerce affected is large or small, or whether the effect of the agreement is to aid or hinder public consumption. These are the words of this Court in *United States v. McKesson & Robbins, Inc.*, 1955, 351 U.S. 305, a price fixing case, as applied to the conspiracy to boycott, as unreasonable per se as is the conspiracy to fix prices.

But respondents have cited many cases which are claimed to show a legal defense here. (Brief for Respondents, pp. 36-41.) But no Appellate Court cited has held that a conspiracy to suppress competition by refusal to deal between horizontal competitors who, on an open market basis, entertain business dealings with potential or existing distributors or retailers equipped to handle their merchandise is a lawful practice under the Sherman Act. While *Shotkin v. General Electric Co.*, 10th Cir., 1948, 171 F. 2d 236, seemed to indicate the contrary, the Tenth Circuit has now expressly held that the case involved only the situation where the Court was not convinced that the complaint there was bona fide. *New Home Appliance Center v. Thompson*, 10th Cir., 1957, 250 F. 2d 881, 883. This case expressly withdrew the "test of public injury" and, rather, held that any horizontal agreement among local competitors to suppress competition is illegal per se. (*Id.*, at 884.)

Other appellate cases cited by the respondents were based on the ground that a single manufacturer who does business on an exclusive agency basis can lawfully decline to deal with an existing agent who has no tenure in such an agency situation. *Fedderson*

Motors v. Ward, 10th Cir., 1950, 180 F. 2d 519, as explained in *New Home Appliance Center v. Thompson,* supra; *Hudson Sales Corp. v. Waldrip,* 5th Cir., 1954, 211 F. 2d 268; *Packard Motor Car Co. v. Webster Motor Car Co.,* D.C. Cir., 1957, 243 F. 2d 418. It is noted that the rule announced in these automobile cases was overruled by the Congress, Automobile Dealers Act, Aug. 8, 1956, 70 Stat. 1125, 15 U.S.C. 1221 ff.

Kinnear Weed Corp. v. Humble Oil & Refining Co., 5th Cir., 1954, 214 F. 2d 891, was not a conspiracy case, and *Miller Motors v. Ford Motor Co.,* 4th Cir., 1958, 252 F. 2d 441, did not involve a conspiracy to boycott.

Ruddy Brook Clothes v. British & Foreign Marine Ins. Co., 7th Cir., 1952, 195 F. 2d 86 did not involve a plaintiff who could offer the merchandise of the defendants for resale in the channels of distribution, or who was dependent on the defendants for his business opportunities. The case was decided before the statement of this Court in *Times Picayune Pub. Co. v. United States,* 1953, 345 U.S. 594 that group boycotts, or concerted refusals to deal, clearly run afoul of Section 1.

CONCLUSION.

The complaint herein disclosed manifest public wrongs condemned by this Court as being in per se violation of the antitrust laws. These public wrongs were not contested by the respondents who have

sought to treat the antitrust laws as allowing a defense of lack of "public injury" even though conduct has been perpetrated which is in per se violation of the standards of the antitrust laws. The antitrust laws as a charter of liberty protect the private trader from the suppression and destruction of his business when accomplished by means forbidden by these laws. Petitioner, a competitive trader, has been erroneously denied a trial by his peers under a statute enacted to provide for equal and untrammeled access to the market place, free of conspiratorial refusals to deal or the use of monopolistic power to eliminate competition.

It is respectfully submitted that the judgment is wrong and should be reversed.

Dated, San Francisco, California,
February 12, 1959.

IRVIN GOLDSTEIN,
MAXWELL KEITH,
Attorneys for Petitioner.

SUPREME COURT OF THE UNITED STATES

No. 76.—October Term, 1958.

Klor's, Inc., Petitioner, v. Broadway-Hale Stores, Inc., Admiral Corporation, Admiral Distributors, Inc., et al. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[April 6, 1959.]

Mr. Justice Black delivered the opinion of the Court.

Klor's, Inc., operates a retail store on Mission Street, San Francisco, California; Broadway-Hale Stores, Inc., a chain of department stores, operates one of its stores next door. The two stores compete in the sale of radios, television sets, refrigerators and other household appliances. Claiming that Broadway-Hale and 10 national manufacturers and their distributors have conspired to restrain and monopolize commerce in violation of §§ 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §§ 1, 2, Klor's brought this action for treble damages and injunction in the United States District Court.[1]

[1] Section 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." Section 2 of the Act reads, "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . . ." Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, states, "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained. . . ."

In support of its claim Klor's made the following allegations: George Klor started an appliance store some years before 1952 and has operated it ever since either individually or as Klor's, Inc. Klor's is as well equipped as Broadway-Hale to handle all brands of appliances. Nevertheless, manufacturers and distributors of such well-known brands as General Electric, RCA, Admiral, Zenith, Emerson and others[2] have conspired among themselves and with Broadway-Hale either not to sell to Klor's or to sell to it only at discriminatory prices and highly unfavorable terms. Broadway-Hale has used its "monopolistic" buying power to bring about this situation. The business of manufacturing, distributing and selling household appliances is in interstate commerce. The concerted refusal to deal with Klor's has seriously handicapped its ability to compete and has already caused it a great loss of profits, goodwill, reputation and prestige.

The defendants did not dispute these allegations, but sought summary judgment and dismissal of the complaint for failure to state a cause of action. They submitted unchallenged affidavits which showed that there were hundreds of other household appliance retailers, some within a few blocks of Klor's who sold many competing brands of appliances, including those the defendants refused to sell to Klor's. From the allegations of the complaint, and from the affidavits supporting the motion for summary judgment, the District Court concluded that the controversy was a "purely private quarrel" between Klor's and Broadway-Hale, which did not amount to a "public wrong proscribed by the [Sherman] Act." On this ground the complaint was dismissed and summary

[2] The appliance manufacturers named in the complaint are: Admiral Corp., Emerson Radio and Phonograph Corp., General Electric Co., Olympic Radio and Television, Inc., Philco Corp., Rheem Manufacturing Co., Radio Corp. of America, Tappan Stove Co., Whirlpool Corp., Zenith Radio Corp.

judgment was entered for the defendants. The Court of Appeals for the Ninth Circuit affirmed the summary judgment. 255 F. 2d 214. It stated that "a violation of the Sherman Act requires conduct of defendants by which the public is or conceivably may be ultimately injured." 255 F. 2d, at 233. It held that here the required public injury was missing since "there was no charge or proof that by any act of defendants the price, quantity or quality offered the public was affected nor, that there was any intent or purpose to effect a change in, or an influence on, prices, quantity, or quality . . . ." *Id.*, at 230. The holding, if correct, means that unless the opportunities for customers to buy in a competitive market are reduced, a group of powerful businessmen may act in concert to deprive a single merchant, like Klor, of the goods he needs to compete effectively. We granted certiorari to consider this important question in the administration of the Sherman Act. 358 U. S. 809.

We think Klor's allegations clearly show one type of trade restraint and public harm the Sherman Act forbids, and that defendants' affidavits provide no defense to the charges. Section 1 of the Sherman Act makes illegal any contract, combination or conspiracy in restraint of trade, and § 2 forbids any person or combination from monopolizing or attempting to monopolize any part of interstate commerce. In the landmark case of *Standard Oil Co.* v. *United States*, 221 U. S. 1, this Court read § 1 to prohibit those classes of contracts or acts which the common law had deemed to be undue restraints of trade and those which new times and economic conditions would make unreasonable. *Id.*, at 59–60. The Court construed § 2 as making "the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof . . . ." *Id.*, at 61. The effect of both sections,

the Court said, was to adopt the common-law proscription of all "contracts or acts which it was considered had a monopolistic tendency . . ." and which interfered with the "natural flow" of an appreciable amount of interstate commerce. *Id.*, at 57, 61; *Eastern States Lumber Assn.* v. *United States*, 234 U. S. 600, 609. The Court recognized that there were some agreements whose validity depended on the surrounding circumstances. It emphasized, however, that there were classes of restraints which from their "nature or character" were unduly restrictive, and hence forbidden by both the common law and the statute. 221 U. S., at 58, 65.[3] As to these classes of restraints, the Court noted, Congress had determined its own criteria of public harm and it was not for the courts to decide whether in an individual case injury had actually occurred. *Id.*, at 63–68.[4]

Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category.[5] They have not been saved by allega-

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[3] See also *United States* v. *American Tobacco Co.*, 221 U. S. 106, 179, where the Court noted that the statute forbade all "acts or contracts or agreements or combinations . . . which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade . . . ."

[4] See also *United States* v. *Trenton Potteries Co.*, 273 U. S. 392, 395–401; *Radovich* v. *National Football League*, 352 U. S. 445, 453–454. In this regard the Sherman Act should be contrasted with § 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. § 45 (b), which requires that the Commission find "that a proceeding by it . . . be to the interest of the public" before it issues a complaint for unfair competition. See *Federal Trade Comm'n* v. *Klesner*, 280 U. S. 19, 27. But cf. *Fashion Originators' Guild* v. *Federal Trade Comm'n*, 312 U. S. 457, 466–467.

[5] See, *e. g.*, *Eastern States Lumber Assn.* v. *United States*, 234 U. S. 600; *Binderup* v. *Pathe Exchange, Inc.*, 263 U. S. 291; *Fashion Originators' Guild* v. *Federal Trade Comm'n*, 312 U. S. 457; *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211, 214; *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 625; *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1, 5.

tions that they were reasonable in the specific circumstances, nor by a failure to show that they "fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality." *Fashion Originators' Guild* v. *Federal Trade Comm'n*, 312 U. S. 457, 466, 467–468. Cf. *United States* v. *Trenton Potteries Co.*, 273 U. S. 392. Even when they operated to lower prices or temporarily to stimulate competition they were banned. For, as this Court said in *Kiefer-Stewart* v. *Seagram & Sons*, 340 U. S. 211, 213, "Such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." Cf. *United States* v. *Patten*, 226 U. S. 525, 542.

Plainly the allegations of this complaint disclose such a boycott. This is not a case of a single trader refusing to deal with another,[6] nor even of a manufacturer and a dealer agreeing to an exclusive distributorship. Alleged in this complaint is a wide combination consisting of manufacturers, distributors and a retailer. This combination takes from Klor's its freedom to buy appliances in an open competitive market and drives it out of business as a dealer in the defendants' products. It deprives the manufacturers and distributors of their freedom to sell to Klor's at the same prices and conditions made available to Broadway-Hale, and in some instances forbids them from selling to it on any terms whatsoever. It interferes with the natural flow of interstate commerce. It clearly has, by its "nature" and "character," a "monopolistic tendency." As such it is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to

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[6] Compare *United States* v. *Colgate & Co.*, 250 U. S. 300, with *United States* v. *Schrader's Son, Inc.*, 252 U. S. 85; *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 719–723; *Lorain Journal Co.* v. *United States*, 342 U. S. 143.

the economy.[1] Monopoly can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups. In recognition of this fact the Sherman Act has consistently been read to forbid all contracts and combinations "which 'tend to create a monopoly,'" whether "the tendency is a creeping one" or "one that proceeds at full gallop." *International Salt Co.* v. *United States*, 332 U. S. 392, 396.

The judgment of the Court of Appeals is reversed and the cause is remanded to the District Court for trial.

Reversed.

MR. JUSTICE HARLAN, believing that the allegations of the complaint are sufficient to entitle the petitioner to go to trial, and that the matters set forth in respondents' affidavits are not necessarily sufficient to constitute a defense irrespective of what the petitioner may be able to prove at the trial, concurs in the result.

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[1] The court below relied heavily on *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, in reaching its conclusion. While some language in that case can be read as supporting the position that no restraint on trade is prohibited by § 1 of the Sherman Act unless it has or is intended to have an effect on market prices, such statements must be considered in the light of the fact that the defendant in that case was a labor union. The Court in *Apex* recognized that the Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives. See *United States* v. *Hutcheson*, 312 U. S. 219; *Allen Bradley Co.* v. *Local 3, International Brotherhood of Electrical Workers*, 325 U. S. 797. Moreover, cases subsequent to *Apex* have made clear that an effect on prices is not essential to a Sherman Act violation. See, *e. g.*, *Fashion Originators' Guild* v. *Federal Trade Comm'n*, 312 U. S. 457, 466.